

12-9-2015

# Silver Creek Seed v. Sunrain Varieties Clerk's Record v. 1 Dckt. 43078

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## Recommended Citation

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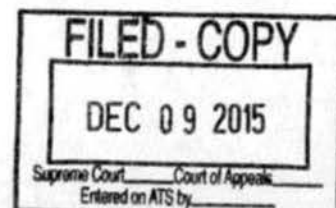
Vol. 1 of 6

Defendant/Appellant.

VOLUME 1

LAW CLERK

43078



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ROA Report

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Case: CV-2013-0000644 Current Judge: Robert J. Elgee

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
10/1/2013	New Case Filed - Other Claims	Robert J. Elgee
	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Wright Brothers Law Office, PLLC Receipt number: 0007021 Dated: 10/1/2013 Amount: \$96.00 (Check) For: Silver Creek Seed, LLC (plaintiff)	Robert J. Elgee
	Plaintiff: Silver Creek Seed, LLC Appearance Andrew B Wright	Robert J. Elgee
	Summons: Document Service Issued: on 10/1/2013 to Sunrain Varieties, LLC; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Complaint and Demand for Jury Trial	Robert J. Elgee
	Summons	Robert J. Elgee
10/30/2013	Answer, counterclaim and jury demand	Robert J. Elgee
	Defendant: Sunrain Varieties, LLC Appearance Michael D Gaffney	Robert J. Elgee
	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Gaffney, Michael D (attorney for Sunrain Varieties, LLC) Receipt number: 0007656 Dated: 10/30/2013 Amount: \$66.00 (Check) For: Sunrain Varieties, LLC (defendant)	Robert J. Elgee
11/4/2013	Notice Of Service	Robert J. Elgee
12/10/2013	Notice Of Service	Robert J. Elgee
12/12/2013	Notice Of Service(2nd Set of Discovery)	Robert J. Elgee
1/6/2014	Notice Of Service	Robert J. Elgee
1/8/2014	Notice Of Service	Robert J. Elgee
1/24/2014	Notice of Trial Scheduling	Robert J. Elgee
1/28/2014	Request for Trial Setting	Robert J. Elgee
	Response to Court's Notice of Trial Scheduling	Robert J. Elgee
2/25/2014	Notice of deposition duces tecum of Silver Creek Seed, LLC pursuant to IRCP 30(b)(6)	Robert J. Elgee
2/28/2014	Amended Notice Of Deposition Duces Tecum of Silver Creek Seed, LLC	Robert J. Elgee
3/13/2014	Hearing Scheduled (Pretrial Conference 07/28/2014 01:45 PM)	Robert J. Elgee
	Hearing Scheduled (Jury Trial 08/20/2014 09:00 AM) 5 days	Robert J. Elgee
	Civil Case Scheduling Order, Notice of Trial Setting and Initial Pretrial Order	Robert J. Elgee
4/7/2014	Amended Notice of Deposition Duces Tecum of Silver Creek Seed, LLC Pursuant to I.R.C.P. 30(b)(6)	Robert J. Elgee
4/9/2014	Notice Of Service	Robert J. Elgee
4/16/2014	Notice Of Service	Robert J. Elgee
4/18/2014	Motion to either extend disclosure deadlines or re-set trial date	Robert J. Elgee
	Affidavit of Andrew B Wright	Robert J. Elgee
5/7/2014	Reply to Counterclaim	Robert J. Elgee
5/21/2014	Notice Of Service	Robert J. Elgee
6/2/2014	Hearing Scheduled (Motion for Partial Summary Judgment 06/30/2014 03:00 PM)	Robert J. Elgee

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Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
6/2/2014	Notice Of Hearing	Robert J. Elgee
	Motion for Partial Summary Judgment	Robert J. Elgee
6/3/2014	Notice Of Hearing	Robert J. Elgee
	Amended Motion for Partial Summary Judgment	Robert J. Elgee
6/5/2014	Notice Of Hearing	Robert J. Elgee
6/16/2014	Affidavit of Aaron Derbidge	Robert J. Elgee
	Affidavit of Lisa Swenson	Robert J. Elgee
	Memorandum in Opposition to Amended Motion for Partial Summary Judgment	Robert J. Elgee
6/23/2014	Affidavit of Andrew B. Wright in Support of Reply Memorandum in Support of Amended Motion for Partial Summary Judgment	Robert J. Elgee
	Motion to Strike	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion to Strike 06/30/2014 03:00 PM)	Robert J. Elgee
6/25/2014	Notice Of Service	Robert J. Elgee
	Reply Memorandum in support of amended motion for partial summary judgment	Robert J. Elgee
	Affidavit of Mark Johnson in support of reply to Sunrain varieties, LLC's opposition to summary judgment	Robert J. Elgee
6/27/2014	Notice Of Taking oral Deposition of Aron Derbridge and Subpeona Duces Tecum	Robert J. Elgee
	Notice Of Taking Oral Deposition of Doug John and subpeona duces tecum	Robert J. Elgee
	Notice Of Taking oral Deposition of Mel Davenport and subpeona duces tecum	Robert J. Elgee
	Motion to Strike Affidavits of Andrew B. Wright and Mark Johnson and to Shorten Time	Robert J. Elgee
6/30/2014	Court Minutes	Robert J. Elgee
	Hearing type: Motion for Partial Summary Judgment	
	Hearing date: 6/30/2014	
	Time: 2:59 pm	
	Courtroom: District Courtroom-judicial Bldg	
	Court reporter: Susan Israel	
	Minutes Clerk: Crystal Rigby	
	Tape Number: DC	
	Party: Silver Creek Seed, LLC, Attorney: Andrew Wright	
	Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	
	Hearing result for Motion to Strike scheduled on 06/30/2014 03:00 PM: District Court Hearing Held	Robert J. Elgee
	Court Reporter: Susan Israel	
	Estimated Number of Transcript Pages for this hearing: less 100	

## Other Claims

Date		Judge
6/30/2014	Hearing result for Motion for Partial Summary Judgment scheduled on 06/30/2014 03:00 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: Amended Motion less 100	Robert J. Elgee
7/14/2014	Stipulated Motion to Vacate and Reset Trial Date	Robert J. Elgee
7/16/2014	Objection to Order on Plaintiff's Motion for Partial Summary Judgment	Robert J. Elgee
7/23/2014	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion in Limine 08/25/2014 03:00 PM) to Exclude Jeff Miller Testimony	Robert J. Elgee
	Defendant's Motion in Limine to Exclude Jeff Miller Testimony	Robert J. Elgee
	Order on Plaintiff's Amended Motion for Partial Summary Judgment	Robert J. Elgee
	Order Vacating Trial Date	Robert J. Elgee
	Hearing result for Jury Trial scheduled on 08/20/2014 09:00 AM: Hearing Vacated 5 days	Robert J. Elgee
	Hearing result for Pretrial Conference scheduled on 07/28/2014 01:45 PM: Hearing Vacated	Robert J. Elgee
7/25/2014	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion 08/25/2014 03:00 PM) to Reconsider	Robert J. Elgee
	Affidavit of Counsel in Support of Motion to Reconsider	Robert J. Elgee
	Motion to Reconsider	Robert J. Elgee
	Memorandum in Support of Motion to Reconsider	Robert J. Elgee
7/28/2014	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion for Partial Summary Judgment 08/25/2014 03:00 PM) 2nd	Robert J. Elgee
	2nd Motion for Partial Summary Judgment	Robert J. Elgee
	Memorandum in Support of 2nd Motion for Partial Summary Judgment	Robert J. Elgee
	Affidavit of Mark Johnson in Support of 2nd Motion for Partial Summary Judgment	Robert J. Elgee
7/29/2014	Defendant's Dates Not Available for Trial Setting	Robert J. Elgee
	Motion for Enlargement of Time	Robert J. Elgee
	Affidavit of Michael D. Gaffney in Support of Motion for Enlargement of Time	Robert J. Elgee
	Notice of Available Dates for Trial Setting	Robert J. Elgee
7/30/2014	Partial Objection to Motion for Enlargement of Time	Robert J. Elgee
	Hearing Scheduled (Scheduling Conference 08/25/2014 03:00 PM) Reset Trial	Robert J. Elgee
	Notice Of Service	Robert J. Elgee
8/1/2014	Affidavit of Michael D. Gaffney	Robert J. Elgee
	Reply to partial objection to motion for enlargement of time	Robert J. Elgee
8/6/2014	Notice Of Telephonic hearing	Robert J. Elgee

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Case: CV-2013-0000644 Current Judge: Robert J. Elgee

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
8/6/2014	Hearing Scheduled (Motion to Enlarge Time 08/08/2014 10:30 AM) telephonic	Robert J. Elgee
8/8/2014	Court Minutes Hearing type: Motion to Enlarge Time Hearing date: 8/8/2014 Time: 10:30 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: ROSA Tape Number: DC Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney Hearing result for Motion to Enlarge Time scheduled on 08/08/2014 10:30 AM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: telephonic less 100 pages	Robert J. Elgee
	Continued (Motion for Partial Summary Judgment 09/15/2014 03:30 PM) 2nd	Robert J. Elgee
	Continued (Motion 09/15/2014 03:00 PM) to Reconsider	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Hearing result for Motion in Limine scheduled on 08/25/2014 03:00 PM: Hearing Vacated to Exclude Jeff Miller Testimony	Robert J. Elgee
	Hearing result for Scheduling Conference scheduled on 08/25/2014 03:00 PM: Hearing Vacated Reset Trial	Robert J. Elgee
8/21/2014	Hearing Scheduled (Jury Trial 02/24/2015 09:00 AM) 5 day except 3/2 and 3/3	Robert J. Elgee
	Hearing Scheduled (Pretrial Conference 02/09/2015 01:30 PM)	Robert J. Elgee
	Civil Case Scheduling Order, Notice of Trial Setting and Initial Pretrial Order	Robert J. Elgee
9/2/2014	Affidavit of Lisa Swenson	Robert J. Elgee
	Affidavit of Aron Derbidge	Robert J. Elgee
	Second Affidavit of Counsel in Opposition to Plaintiff's Second Motion for Partial Summary Judgment and in Support of Motion for Reconsideration	Robert J. Elgee
	Defendant's Memorandum in Opposition to Plaintiff's Second Motion for Partial Summary Judgment and Supplemental Memorandum in Support of Motion for Reconsideration	Robert J. Elgee
9/8/2014	Reply Memorandum in Support of 2nd Motion for Partial Summary Judgment	Robert J. Elgee
9/10/2014	Objection and Memorandum in Opposition to Sunrain's Motion to Reconsider	Robert J. Elgee
9/15/2014	Defendat's reply memorandum in support of motion for reconsideration	Robert J. Elgee

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Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

## Other Claims

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Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
12/22/2014	Case Taken Under Advisement	Robert J. Elgee
12/26/2014	No longer U/A	Robert J. Elgee
	Court's Email to Parties	Robert J. Elgee
1/15/2015	Notice Of Service	Robert J. Elgee
	Defendant's Witness List	Robert J. Elgee
1/16/2015	Plaintiff/Counterdefendant's Witness Disclosure	Robert J. Elgee
	Notice Of Service	Robert J. Elgee
2/2/2015	Notice Of Taking Oral Deposition of Jeff Bragg and Subpoena Duces Tecum	Robert J. Elgee
2/3/2015	Notice of vacating deposition of Jeff Bragg	Robert J. Elgee
2/9/2015	Court Minutes Hearing type: Pretrial Conference Hearing date: 2/9/2015 Time: 1:34 pm Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: mini Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee
	Defendant's Renewed First Motion in Limine	Robert J. Elgee
	Defendant's Memorandum in Support of Defendant's Renewed First Motion in Limine	Robert J. Elgee
	Affidavit of Counsel in Support of Defendant's Renewed First Motion in Limine	Robert J. Elgee
	Hearing result for Pretrial Conference scheduled on 02/09/2015 01:30 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: less 100	Robert J. Elgee
2/10/2015	Affidavit of Mark Johnson in Support of Objection to Defendant's Motion in Limine	Robert J. Elgee
	Notice Of Taking Oral Deposition of Jeff Bragg	Robert J. Elgee
2/13/2015	Hearing Scheduled (Motion in Limine 02/17/2015 11:00 AM)	Robert J. Elgee
2/17/2015	Second Affidavit of counsel in support of renewed first motion in limine	Robert J. Elgee
	Court Minutes Hearing type: Motion in Limine Hearing date: 2/17/2015 Time: 10:59 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: mini Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee
	Proposed Special Verdict Form	Robert J. Elgee

## Other Claims

Date		Judge
2/17/2015	Defendant's Proposed Statement of Case	Robert J. Elgee
	Defendant's Exhibit List	Robert J. Elgee
	Defendant's Proposed Jury Instructions	Robert J. Elgee
	Hearing result for Motion in Limine scheduled on 02/17/2015 11:00 AM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: less 100	Robert J. Elgee
2/19/2015	Plaintiff/Counterdefendant's Proposed Statement of the Case	Robert J. Elgee
	Plaintiff/Counterdefendant's Proposed Jury Instructions	Robert J. Elgee
2/23/2015	Notice of Intent to Produce Deposition Testimony in Lieu of Live Testimony	Robert J. Elgee
	Affidavit of Brandon T. Berrett	Robert J. Elgee
2/24/2015	Court Minutes Hearing type: Jury Trial Hearing date: 2/24/2015 Time: 9:00 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: DC Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee
	Docket Scramble List	Robert J. Elgee
	Potential Jury Seating Chart	Robert J. Elgee
	Peremptory Challenges	Robert J. Elgee
	Initial Instructions to the Prospective Jury	Robert J. Elgee
	Preliminary Instructions to the Jury	Robert J. Elgee
	Initial Instructions to the Prospective Jury	Robert J. Elgee
	Preliminary Instructions to the Jury	Robert J. Elgee
	Hearing result for Jury Trial scheduled on 02/24/2015 09:00 AM: Jury Trial Started 5 day except 3/2 and 3/3	Robert J. Elgee
2/25/2015	Court Minutes Hearing type: Jury Trial Hearing date: 2/25/2015 Time: 8:35 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: DC Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee
	Stipulation regarding guilty plea & plea in absencia (juror Brian Formusa)	Robert J. Elgee
	Stipulation regarding guilty plea & plea in absencia (juror Mark Moulton)	Robert J. Elgee
	Stipulation regarding guilty plea & plea in absencia (juror Delmar Hart)	Robert J. Elgee
	Stipulation regarding guilty plea & plea in absencia (juror Barbara Scher)	Robert J. Elgee

## Other Claims

Date		Judge
2/26/2015	Court Minutes Hearing type: Jury Trial DAY 3 Hearing date: 2/26/2015 Time: 8:54 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: ANDREA Tape Number: Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee
2/27/2015	Defendant's Proposed Supplemental Jury Instructions	Robert J. Elgee
	Court Minutes Hearing type: Jury Trial Day Four Hearing date: 2/27/2015 Time: 8:57 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: ROSA Tape Number: Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee
	Final Jury Instructions	Robert J. Elgee
	Final seating chart showing alternate	Robert J. Elgee
	Final Exhibit/Witness List	Robert J. Elgee
	Jury Verdict Form	Robert J. Elgee
3/2/2015	Order from Show Cause Hearing (Juror Brian Formusa)	Robert J. Elgee
	Order from Show Cause Hearing (Juror Mark Moulton)	Robert J. Elgee
	Order from Show Cause Hearing (Juror Delmar Hart)	Robert J. Elgee
	Order from Show Cause Hearing (Juror Barbara Scher)	Robert J. Elgee
	Completion of Community Service(Juror Delmar Heart)	Robert J. Elgee
3/5/2015	Stipulation Regarding Guilty Plea and Plea in Absencia (Juror Christina Arpp)	Robert J. Elgee
	Motion for pre-judgment interest	Robert J. Elgee
3/10/2015	Order from Show Cause Hearing (Juror Christina Arpp)	Robert J. Elgee
3/12/2015	Completion of Community Service(Juror Mark Moulton)	Robert J. Elgee
3/13/2015	Order on directed verdict	Robert J. Elgee
	Order on verdict offset and prejudgment interest	Robert J. Elgee
	Judgment	Robert J. Elgee
	STATUS CHANGED: Closed pending clerk action	Robert J. Elgee
	Civil Disposition entered for: Sunrain Varieties, LLC, Defendant; Silver Creek Seed, LLC, Plaintiff. Filing date: 3/13/2015	Robert J. Elgee
3/16/2015	Completion of Community Service(Juror Barbara Scher)	Robert J. Elgee
3/17/2015	Defendant Memorandum in Opposition to Motion for Prejudgment Interest	Robert J. Elgee
3/18/2015	Order Unsealing Court Record	Robert J. Elgee



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Case: CV-2013-0000644 Current Judge: Robert J. Elgee

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
3/18/2015	Defendant's Memorandum in Support of Motion to Stay Proceedings to Enforce a Judgment	Robert J. Elgee
	Defendant's Motion to Stay Proceedings to Enforce a Judgment	Robert J. Elgee
3/19/2015	Motion and Memorandum of Costs and Attorney Fees	Robert J. Elgee
	Affidavit of Mark Johnson in Support of Motion and Memorandum of Costs and Attorney Fees	Robert J. Elgee
3/24/2015	Objection to defendant's motion to stay proceedings to enforce a judgment	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion 04/13/2015 02:30 PM) Motion to Stay proceedings to Enforce a Judgment	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Amended Notice Of Hearing	Robert J. Elgee
	Motion to Shorten Time	Robert J. Elgee
	Request for Telephonic Appearance	Robert J. Elgee
3/25/2015	Continued (Motion 04/01/2015 01:30 PM) Motion to Shorten time for Motion to Stay proceedings to Enforce a Judgment	Robert J. Elgee
	Hearing Scheduled (Motion for Attorney fees and Costs 04/13/2015 02:30 PM)	Robert J. Elgee
3/26/2015	Affidavit of Steve Ottum	Robert J. Elgee
3/27/2015	Miscellaneous Payment: For Comparing And Confirming A Prepared Record, Per Page Paid by: Wright Brothers Receipt number: 0001760 Dated: 3/27/2015 Amount: \$1.00 (Check)	Robert J. Elgee
	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Wright Brothers Receipt number: 0001760 Dated: 3/27/2015 Amount: \$1.00 (Check)	Robert J. Elgee
3/30/2015	Stipulation Regarding Guilty Plea and Plea in Absencia (Juror David Arnaiz)	Robert J. Elgee
3/31/2015	Objection to plaintiff's motion for costs and attorney fees	Robert J. Elgee
	Order Shortening Time	Robert J. Elgee
	Order Allowing Telephonic Appearance	Robert J. Elgee
	Motion to disallow costs and attorney fees	Robert J. Elgee
4/1/2015	Court Minutes Hearing type: Motion Hearing date: 4/1/2015 Time: 1:15 pm Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: DC Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	Robert J. Elgee

## Other Claims

Date		Judge
4/1/2015	Hearing result for Motion scheduled on 04/01/2015 01:30 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: Motion to Stay proceedings to Enforce a Judgment--- Telephonic less 100 Order From Show Cause Hearing (Juror David Arnaiz)	Robert J. Elgee Robert J. Elgee
4/2/2015	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Beard St. Clair Gaffney PA Receipt number: 0001877 Dated: 4/2/2015 Amount: \$129.00 (Check) For: Sunrain Varieties, LLC (defendant) Bond Posted - Cash (Receipt 1878 Dated 4/2/2015 for 100.00) Notice Of Appeal Appealed To The Supreme Court STATUS CHANGED: Inactive	Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee
4/9/2015	Defendant's Motion for Relief from Final Judgment	Robert J. Elgee
4/10/2015	Motion to shorten time Notice Of Hearing Hearing Scheduled (Motion to Shorten Time 04/13/2015 02:30 PM) motion shorten time for Def's motion for relief from final judgment Defendant's renewed Motion to stay proceedings to enforce a judgment Defendant's Memorandum in support of renewed Motion to stay proceedings to enforce a judgment Objection to defendant's motion for relief from final judgment Objection to Defendant's Motion for Relief from Final Judgment	Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee
4/13/2015	Court Minutes Hearing type: Motion for Attorney fees and Costs Hearing date: 4/13/2015 Time: 2:08 pm Courtroom: District Courtroom-judicial Bldg Court reporter: Cathy Pavkov Minutes Clerk: Crystal Rigby Tape Number: DC Party: Silver Creek Seed, LLC, Attorney: Andrew Wright Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney Hearing result for Motion to Shorten Time scheduled on 04/13/2015 02:30 PM: District Court Hearing Held Court Reporter: Cathy Pavkov Estimated Number of Transcript Pages for this hearing: motion shorten time for Def's motion for relief from final judgment less 100 Hearing result for Motion for Attorney fees and Costs scheduled on 04/13/2015 02:30 PM: District Court Hearing Held Court Reporter: Cathy Pavkov Estimated Number of Transcript Pages for this hearing: less 100	Robert J. Elgee Robert J. Elgee Robert J. Elgee
4/15/2015	Order Shortening Time Completion of Community Service-Brian Formusa Juror Letter (Juror Christina Arpp)	Robert J. Elgee Robert J. Elgee Robert J. Elgee

## Other Claims

Date		Judge
4/15/2015	Request for Additional Transcripts and Record	Robert J. Elgee
	Completion of Community Service-Christina Arpp	Robert J. Elgee
4/16/2015	Motion to shorten time	Robert J. Elgee
	Notice of expedited telephonic hearing	Robert J. Elgee
4/17/2015	Hearing Scheduled (Motion 04/20/2015 03:00 PM) def's renewed motion to stay proceedings to enforce judgment	Robert J. Elgee
	Order shortening time	Robert J. Elgee
	Objection to Defendant's Renewed Motion to Stay Proceedings to Enforce a Judgment and Motion Objecting to Sufficiency of Letter of Credit	Robert J. Elgee
4/20/2015	Court Minutes	Robert J. Elgee
	Hearing type: Motion	
	Hearing date: 4/20/2015	
	Time: 2:58 pm	
	Courtroom: District Courtroom-judicial Bldg	
	Court reporter: Susan Israel	
	Minutes Clerk: Crystal Rigby	
	Tape Number: DC	
	Writ of Execution Issued	Robert J. Elgee
	Application and Affidavit for writ of execution	Robert J. Elgee
	Writ: Document Service Issued: on 4/20/2015 to Sunrain Varieties, LLC; Assigned to Blaine County Sheriff's Office. Service Fee of \$0.00.	Robert J. Elgee
	Hearing result for Motion scheduled on 04/20/2015 03:00 PM: District Court Hearing Held	Robert J. Elgee
	Court Reporter: Susan Israel	
	Estimated Number of Transcript Pages for this hearing: def's renewed motion to stay proceedings to enforce judgment less 100	
	Affidavit of Counsel in Support of Renewed Motion for Stay of Proceedings to Enforce a Judgment	Robert J. Elgee
	Defendant's Reply Memorandum in Support of Renewed Motion for Stay of Proceedings to Enforce a Judgment	Robert J. Elgee
4/21/2015	Order (Defendant's Motion for Relief from Final Judgment)	Robert J. Elgee
4/23/2015	Defendant's Motion to Stay Proceedings to enforce a judgment	Robert J. Elgee
4/24/2015	Defendant's Amended Motion to Stay Proceedings to Enforce a Judgment	Robert J. Elgee
	Objection to Defendant's motion to stay proceedings to enforce a judgment	Robert J. Elgee
4/27/2015	Bond Posted - Cash (Receipt 2374 Dated 4/27/2015 for 100.00)	Robert J. Elgee
	Bond Posted - Surety (Amount 1517794.91 )	Robert J. Elgee
	Order Staying Proceedings to Enforce a Judgment	Robert J. Elgee
	Order (Defendant's Renewed Motion to Stay Proceedings to Enforce a Judgment and Plaintiff's Motion Objecting to Sufficiency of Letter of Credit)	Robert J. Elgee
5/4/2015	Defendant's Motion to Release Judgment Lien	Robert J. Elgee
	Defendant's Memorandum in Support of Motion to Release a Judgment Lien	Robert J. Elgee
	Affidavit of Counsel	Robert J. Elgee

## Other Claims

Date		Judge
5/4/2015	Affidavit of Steve Ottum in Support of Motion to Release a Judgment Lien and Motion to Release Garnished Funds	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion 05/18/2015 02:30 PM) to Release Lien	Robert J. Elgee
	Defendant's Motion to Release Garnished Funds	Robert J. Elgee
	Defendant's Memorandum in Support of Motion to Release Garnished Funds	Robert J. Elgee
5/5/2015	Motion to Contest Claim of Exemption	Robert J. Elgee
	Hearing Scheduled (Motion 05/18/2015 02:30 PM) to Contest Claim of Exemption	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
5/6/2015	Letter (Juror David Arnaiz)	Robert J. Elgee
5/8/2015	Objection to Defendant's Motion to Release Judgment Lien	Robert J. Elgee
	Objection to Defendant's Motion to Release Garnished Funds	Robert J. Elgee
5/11/2015	Defendant's Response to Motion to Contest Claim of Exemption	Robert J. Elgee
5/13/2015	Decision on attorney fees and costs	Robert J. Elgee
5/14/2015	Reply Memorandum in Support of Motion to Release Judgment Lien	Robert J. Elgee
	Motion to Extend Stay	Robert J. Elgee
	Motion to Shorten Time	Robert J. Elgee
	Reply Memorandum in Support of Motion to Release Garnished Funds	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion 05/18/2015 02:30 PM) to Extend Stay	Robert J. Elgee
5/15/2015	Objection to Application for Amended Judgment	Robert J. Elgee
5/18/2015	Notice Of Hearing	Robert J. Elgee
	Hearing Scheduled (Motion 05/18/2015 02:30 PM) to Release Garnished Funds	Robert J. Elgee
	Court Minutes	Robert J. Elgee
	Hearing type: Motion	
	Hearing date: 5/18/2015	
	Time: 2:34 pm	
	Courtroom: District Courtroom-judicial Bldg	
	Court reporter: Susan Israel	
	Minutes Clerk: Crystal Rigby	
	Tape Number: DC	
	Party: Silver Creek Seed, LLC, Attorney: Andrew Wright	
	Party: Sunrain Varieties, LLC, Attorney: Michael Gaffney	
	Hearing result for Motion scheduled on 05/18/2015 02:30 PM: District Court Hearing Held	Robert J. Elgee
	Court Reporter: Susan Israel	
	Estimated Number of Transcript Pages for this hearing: to Release Garnished Funds less 100	

Date: 8/18/2015

Fifth Judicial District Court - Blaine County

User: CRYSTAL

Time: 03:23 PM

ROA Report

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Case: CV-2013-0000644 Current Judge: Robert J. Elgee

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
5/18/2015	Hearing result for Motion scheduled on 05/18/2015 02:30 PM: District Court Hearing Held Court Reporter:Susan Israel Estimated Number of Transcript Pages for this hearing: to Extend Stay less 100	Robert J. Elgee
	Hearing result for Motion scheduled on 05/18/2015 02:30 PM: District Court Hearing Held Court Reporter:Susan Israel Estimated Number of Transcript Pages for this hearing: to Contest Claim of Exemption less 100	Robert J. Elgee
	Hearing result for Motion scheduled on 05/18/2015 02:30 PM: District Court Hearing Held Court Reporter:Susan Israel Estimated Number of Transcript Pages for this hearing: to Release Lien less 100	Robert J. Elgee
	Application for Amended Judgment	Robert J. Elgee
5/21/2015	Notice of Transcript to be Lodged	Robert J. Elgee
	Motion to Reconsider	Robert J. Elgee
5/26/2015	Order Shortening Time	Robert J. Elgee
	Order Granting Motion to Release Granished Funds	Robert J. Elgee
	Supplemental Judgment	Robert J. Elgee
	Miscellaneous Payment: For Making Copies Of Clerk's Record For Appeal Per Page Paid by: Beard St. Clair Gaffney, PA Receipt number: 0002969 Dated: 5/26/2015 Amount: \$1,217.50 (Check)	Robert J. Elgee
	Bond Converted (Transaction number 300 dated 5/26/2015 amount 100.00)	Robert J. Elgee
	Bond Converted (Transaction number 301 dated 5/26/2015 amount 47.50)	Robert J. Elgee
	Cash Bond Exonerated (Amount 52.50)	Robert J. Elgee
	Defendant's Memorandum in Opposition to Plaintiff's Motion to Reconsider	Robert J. Elgee
6/1/2015	Amended Notice Of Appeal	Robert J. Elgee
6/3/2015	Miscellaneous Payment: For Making Copies Of Clerk's Record For Appeal Per Page Paid by: County Warrant Receipt number: 0003152 Dated: 6/3/2015 Amount: \$147.50 (Check)	Robert J. Elgee
	Order Granting Motion to Release Judgment Lien	Robert J. Elgee
	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Beard St.Clare Receipt number: 0003164 Dated: 6/3/2015 Amount: \$2.00 (Credit card)	Robert J. Elgee
	Miscellaneous Payment: Technology Cost - CC Paid by: Beard St.Clare Receipt number: 0003164 Dated: 6/3/2015 Amount: \$3.00 (Credit card)	Robert J. Elgee
6/4/2015	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Beard St. Clair Gaffney PA Receipt number: 0003188 Dated: 6/4/2015 Amount: \$3.00 (Check)	Robert J. Elgee
	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Beard St. Clair Gaffney PA Receipt number: 0003188 Dated: 6/4/2015 Amount: \$3.00 (Check)	Robert J. Elgee

Date: 8/18/2015

**Fifth Judicial District Court - Blaine County**

User: CRYSTAL

Time: 03:23 PM

ROA Report

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Case: CV-2013-0000644 Current Judge: Robert J. Elgee

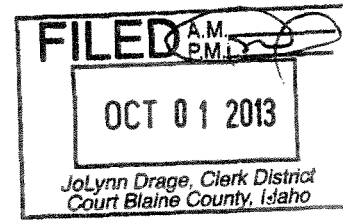
Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Silver Creek Seed, LLC vs. Sunrain Varieties, LLC

Other Claims

Date		Judge
6/22/2015	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Racine Law Receipt number: 0003566 Dated: 6/22/2015 Amount: \$111.00 (Credit card)	Robert J. Elgee
	Miscellaneous Payment: Technology Cost - CC Paid by: Racine Law Receipt number: 0003566 Dated: 6/22/2015 Amount: \$3.00 (Credit card)	Robert J. Elgee

Andrew B. Wright [ISB No. 6812]  
WRIGHT BROTHERS LAW OFFICE, PLLC  
1166 Eastland Drive North, Suite A  
P.O. Box 226  
Twin Falls, ID 83303  
Telephone No. (208) 733-3107  
Facsimile No. (208) 733-1669  
e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff Silver Creek Seed, LLC

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )

Plaintiff, )

vs. )

SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )

Defendant. )

Case No. CV-2013-644

**COMPLAINT AND DEMAND FOR  
JURY TRIAL**

Category: A  
Fee: \$96.00

**ROBERT J. ELGEE**

Plaintiff Silver Creek Seed, LLC, by and through its attorney, Andrew B. Wright of  
Wright Brothers Law Office, PLLC, complains and alleges against Defendant SunRain Varieties,  
LLC as follows:

**PARTIES AND JURISDICTION**

1.

Plaintiff Silver Creek Seed, LLC ("Silver Creek") is a limited liability company located  
in Picabo, Blaine County, Idaho.

2.

Defendant SunRain Varieties, LLC ("SunRain") is a Delaware limited liability company.

3.

This is an action to recover money damages in excess of the \$10,000 minimum jurisdictional limit of this Court.

4.

Venue is proper in Blaine County, Idaho pursuant to Idaho Code § 5-404.

### **GENERAL ALLEGATIONS**

5.

On or about May, 2012, Silver Creek and SunRain agreed, among other things, that SunRain would provide specific varieties of certified seed potatoes (the "Potatoes") to Silver Creek to cut, store, and grow. The parties also agreed that SunRain would purchase the Potatoes from Silver Creek and that the Potatoes could not be sold by Silver Creek to any third party. A copy of the *Blanket Variety Contract* signed by the parties is attached hereto as Exhibit A and incorporated herein by reference.

6.

Pursuant to the parties' agreement, SunRain provided the Potatoes to Silver Creek. However, unknown to Silver Creek, the Potatoes provided by SunRain were infected with bacterial ring rot.

7.

After obtaining the Potatoes from SunRain, Silver Creek cut, stored, and grew the Potatoes. Thereafter, SunRain requested that Silver Creek subject the Potatoes to additional



testing so that SunRain could export the Potatoes to Canada. The testing on the Potatoes revealed the presence of bacterial ring rot.

8.

As a result of the above-described discovery of bacterial ring rot, SunRain refused to take the Potatoes and pay Silver Creek pursuant to the parties' agreement.

# **I. BREACH OF CONTRACT**

9.

Silver Creek incorporates herein by reference all of the allegations of this Complaint.

10.

The parties agreed, among other things, that SunRain would provide the Potatoes to Silver Creek to cut, store, and grow as seed potatoes, and SunRain agreed to pay Silver Creek for the Potatoes.

11.

SunRain's conduct breached the above-described agreement and the covenant of good faith and fair dealing, which conduct included, without limitation, providing infected Potatoes to Silver Creek and failing to pay Silver Creek pursuant to the parties' agreement.

12.

As a direct result of the above-described breach of contract by SunRain, Silver Creek has been damaged, which damages include, without limitation, the loss of the contract price for the Potatoes, costs of additional lab testing, the loss due to Silver Creek's inability to re-certify its non-SunRain potatoes, disinfectant and cleanup costs, and loss of other future potato related business with third parties as a result of testing positive for bacterial ring rot. Silver Creek has been damaged in an amount to be proven at trial.

13.

Silver Creek is further entitled to recover reasonable court costs, including attorney's fees, as provided by Idaho law, including Idaho Code § 12-120.

## **II. BREACH OF IMPLIED WARRANTIES OF MARKETABILITY**

14.

Silver Creek incorporates herein by reference all of the allegations of this Complaint.

15.

SunRain sold the Potatoes to Silver Creek, warranted to Silver Creek that the Potatoes were fit for its intended use, and did not disclaim such warranty. Since the Potatoes were not fit for their intended use, SunRain breached its implied warranty of merchantability (Idaho Code § 28-2-314) and contract with Silver Creek, all of which caused significant damage to Silver Creek.

16.

SunRain knew that Silver Creek needed seed potatoes that were free from bacterial ring rot and provided the Potatoes to Silver Creek, who purchased the Potatoes from SunRain in reliance upon SunRain's purported knowledge and expertise. Since the Potatoes were not fit for their intended purpose, SunRain breached its implied warranty of fitness for a particular purpose (Idaho Code § 28-2-315) and contract with Silver Creek, all of which caused significant damage to Silver Creek.

17.

As a direct and proximate result of the above-described breach of contract, implied warranty of merchantability, and implied warranty of fitness, Silver Creek suffered damages, which damages include, but are not limited to, the loss of the contract price for the Potatoes,

costs of additional lab testing, the loss due to Silver Creek's inability to re-certify its non-SunRain potatoes, disinfectant and cleanup costs, and loss of other future potato related business with third parties as a result of testing positive for bacterial ring rot. Silver Creek has been damaged in an amount to be proven at trial.

18.

Silver Creek is further entitled to recover reasonable court costs, including attorney's fees, as provided by Idaho law, including Idaho Code § 12-120.

**DEMAND FOR JURY TRIAL**

Silver Creek requests that this matter be tried by a jury of 12 persons.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Silver Creek Seed, LLC prays for the following relief against Defendant SunRain Varieties, LLC:

- A. For the damages caused by the above-described breach of contract, implied warranty of merchantability, and implied warranty of fitness, which include, but are not limited to, the loss of the contract price for the Potatoes, costs of additional lab testing, the loss due to Silver Creek's inability to re-certify its non-SunRain potatoes, disinfectant and cleanup costs, and loss of other future potato related business with third parties as a result of testing positive for ring rot;
- B. For interest on all items of fixed costs;
- C. For reasonable court costs and attorney's fees; and
- D. For such other relief as is just and equitable.

DATED this 30 day of September, 2013.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: \_\_\_\_\_

Andrew B. Wright  
Attorneys for Plaintiff

# EXHIBIT A

# Sunrain Potato Varieties, L.L.C. Seed Potato Grower Contract

## *Blanket Variety Contract*

This agreement (hereinafter referred to as "Agreement") is made and entered into this 10th day of May, 2012 by and between Sunrain Potato Varieties, L.L.C. a Delaware Limited Liability Company, hereinafter referred to as "Sunrain", and Silver Creek Seed L.L.C. Seed Farms, an Idaho partnership, hereinafter referred to as "Silver Creek Seed L.L.C.".

**Whereas**, Sunrain wishes to secure a secure, clean source of certified potato seed of Proprietary varieties, for Sunrain's/ 2013 commercial planting seasons, AND

**Whereas**, Silver Creek Seed L.L.C. is in the business to supply certified potato seed;

**Now, Therefore**, in consideration of the covenants and conditions contained herein, Sunrain and Silver Creek Seed L.L.C. do agree to the following:

- 1) **TERM:** The Term of this agreement shall be for Silver Creek Seed L.L.C.'s seed crop grown in 2012, in or around Blaine County for delivery to commercial growers in December 2012, culminating in last deliveries in May 2013. This contract will be renewable for 2013-2014, upon renegotiation of seed quality and yield in the event of a pricing change. In addition this will be a rolling, 3 Year contract depending on annual evaluation of the program, varieties, and pricing structure. Parties will endeavor to meet pricing laid forward based on costing of early generation seed lots incoming to Silver Creek Seed. There will be two down payments on the seed for delivery in commercial years beginning in the fall of 2012. The dates will be December 31, March 1 for \$2.00/cwt for December payment and \$3.00 for the March payment. The final payment is due 30 days after shipping, and Silver Creek will invoice Sunrain for both down payments, and invoices regarding shipments. In addition, Sunrain will rent 1 storage facility beginning in 2012 Fall. The pricing will be .55 cents per cwt and the payments will be 1/3, 1/3, and 1/3. The payment schedule on the storage will be Oct 1, Feb, 1, and final payment 30 days after storage is empty. Silver Creek will take care of power, and oversee management of the storage, reporting to Sunrain any issues it deems necessary for proper seed storage. In addition, the building will carry insurance to ensure both parties that the product is covered by necessary insurance for the contents.

- 2) **PRICE and QUANTITY:** For the seed years 2012, 2013-commercial year 2012-2013, Silver Creek Seed L.L.C. agrees to sell Generation 3 Proprietary seed potatoes and Sunrain agrees to purchase all cwt Generation 3 seed potatoes. Silver Creek Seed L.L.C. also will not be able to sell these varieties to any other entity other than Sunrain due to Sunrain's exclusive ownership of the varieties. Generation 3 seed will be sold to Sunrain at \$ 13.50 per cwt. In the event that the yield falls below 350 cwt the price will go to \$14.50/cwt. All prices are loaded bulk

delivery aboard Sunrain's trucks F.O.B. Silver Creek Seed L.L.C.'s storages. Silver Creek Seed L.L.C. shall cooperate with Sunrain's delivery schedules. All acreage will be GPS monitored and volume to back up yield calculations will be done by scaled out weights. Any Generation 2 seed sold to Sunrain will be priced at \$25.00 dollars/cwt and this price is based on 2012 incoming seed prices. Future pricing will depend on incoming early generation pricing on the Generation 2 seed.

3) **SIZE:** Size of seed shall be 1-1/2 oz. Minimum and 9.5 oz. Maximum, with a 5% tolerance on both size limits. Seed over the maximum size or under the minimum will be appraised to packing quality by Sunrain at harvest time and be considered to be packed at Potandon's fresh packing operation at Idaho Select or Walters's Produce, at either location in Idaho. The price will be \$6/cwt of bulk product. In no event shall seed potatoes exceed 5% on either minimum or maximum size be accepted. Sunrain reserves the right to refuse/reject any loads exceeding 5% on either minimum or maximum sizes.

4) **SEED QUALITY STANDARDS:** The seed shall conform to Idaho Crop Improvement Association standards for the generation being delivered to Sunrain, and must meet all certification requirements of the State of Idaho. All seed potatoes grown pursuant to this Agreement shall be inspected in the fields and storages by the appropriate inspectors. All seed potatoes shall be free from frost damage. Each load will be inspected, tagged, sealed, and certified prior to departure from Silver Creek Seed L.L.C.'s storages by the appropriate state inspection service. Each load will have an inspection certificate upon departure for Sunrain's destination. No advance payments shall be due with the exception of a down payment due 30 days after harvest. Silver Creek Seed L.L.C. will provide Sunrain with proof of said potatoes passing all certifications, and field inspections, due at the time of delivery or after final inspections. In addition, Silver Creek Seed L.L.C. agrees to follow Sunrain/Potandon/Solanum Seed Grower protocol "Attachment A". Also for all seed lots every attempt will be taken to allow seed to pass all state certification requirements as well as Phytosanitary requirements necessary for shipping into Canada. This will include PCN testing to USDA/CFIA guidelines and Columbia Basin Root Knot and Potato Rot Nematode testing. In addition 400 tuber samples will be sent to a USDA approved testing facility for Bacterial Ring Rot. Silver Creek Seed L.L.C. will attempt to make its seed potatoes make US Fresh Grade in the growing of the seed crops.

5) **SEED EXCLUSIVITY:** Silver Creek Seed L.L.C. understands that all varieties supplied by Sunrain are exclusive to Sunrain and cannot be sold in any method to other potato producers without Sunrain's written consent. In addition, Silver Creek Seed L.L.C. agrees to Solanum's Grower Agreement concerning the exclusivity of the varieties. (See Attachment "B")

6) **PAYMENT:** Upon proof of seed quality standards, full payment shall be made 30 days after delivery of said variety.

7) **ATTORNEY FEES-VENUE; APPLICABLE LAW:** Should any litigation be commenced between the parties concerning this Agreement or the rights and duties of the parties

in relation thereto, the action shall be brought exclusively in Bonneville County, Idaho and the prevailing party shall be entitled to recover actual attorney fees and costs incurred in such litigation. It is further agreed that either party may seek immediate injunctive relief for the performance of any term or condition of this Agreement. This Agreement shall be governed in accordance with the laws of the state of Idaho.

8) **ASSIGNMENT-SUCCESSORS:** This Agreement shall not be subcontracted, transferred, assigned or otherwise succeeded to, nor shall the performance of any of the duties set forth above be delegable by either party, without prior written consent of the other party. In the event of an assignment by consent, this Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of both parties. This Agreement shall not be assignable by operation of law.

9) **WAIVER OF BREACH:** The failure of either party to insist upon strict performance of any of the covenants and agreements contained herein shall not be construed to be a waiver or relinquishment of any such options or rights or of any other covenants or agreements, but the same shall be and remain in full force and effect.

10) **FORCE MAJEURE:** Silver Creek Seed L.L.C. and/or Sunrain's obligations under this Agreement shall be abated in the event or by virtue of acts of God, war, civil unrest, or other similar cause or event which materially affects the applicable party's ability to perform.

11) **NOTICES:** Any notice required to be given by any party to the other shall be deposited in the United States mail, registered or certified mail, return receipt requested, postage prepaid, addressed to Silver Creek Seed L.L.C. Seed Farms, PO Box 646 Picabo, Idaho 83348, or to Sunrain Potato Varieties, L.L.C., Attention Mel Davenport, 1210 Pier View Drive, Idaho Falls, Idaho 83404.

12) **CONFIDENTIALITY:** Both parties mutually agree not to disclose any of the terms of this Agreement to any third party as long as the Agreement remains in effect, provided that Silver Creek Seed L.L.C. may disclose terms for the sole purpose of obtaining financing so long as the financial institution(s) agree(s) to the terms of this confidentiality clause.

13) **WARRANTY AND LIMITATIONS OF LIABILITY:** Silver Creek Seed L.L.C. warrants that the potatoes sold hereunder, (i) shall be conveyed free and clear of all liens, encumbrances, (ii) are of merchantable quality as set forth herein, (iii) are fit for their intended use, and (iv) conform to the description and meets or exceeds the quality standards contained herein above. Silver Creek Seed L.L.C. shall indemnify and hold Sunrain harmless from all crop liens, security interests, debts, obligations and encumbrances and all costs and damages arising therefrom, including reasonable attorneys' fees and costs. As an additional remedy, Sunrain may include as additional payees on any payment checks payable to Silver Creek Seed L.L.C.; (a) anyone claiming any interest in the seed or proceeds purchased under this contract; (b) as of the time of each payment which may be due hereunder, any other person or company which notifies Sunrain, or records or files its notice of its claim of interest in the seed or proceeds therefrom.



Sunrain shall have no obligation to verify or consider the validity of such claims or notifications, and may include any claimant's name on such checks regardless of the validity of the claim. Silver Creek Seed L.L.C. makes no other warranties, express or implied, not otherwise contained herein. Consequential and incidental damages are hereby expressly excluded.

14) **ENTIRE AGREEMENT:** This instrument contains the entire Agreement between the parties and supersedes any prior agreement, written or oral, between them and shall not be modified except by an agreement in writing executed by all parties. This Agreement shall be amended only by written instruction signed by all parties. Headings of this Agreement are for convenience only and are not part of the Agreement and do not in any way limit or amplify the terms or provisions of the Agreement.


15) **WARRANTIES AND REPRESENTATIONS:** Each party warrants and represents to the other that it has the legal authority to enter into, execute and perform this Agreement, which each party is duly organized and in good standing under applicable law, and that the execution or performance of this Agreement shall not violate or breach any third party agreement or other obligation.

*Sunrain Potato Varieties, L.L.C.*

By:

Its:

Date:

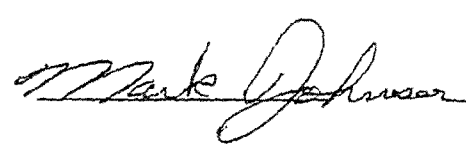
  
VP Sales/OPS  
5/10/2012

*Silver Creek Seed L.L.C.*

By:

Its:

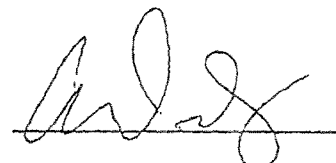
Date:

  
President  
5-10-2012

By:

Its:

Date:

  
Business Manager  
5-10-2012

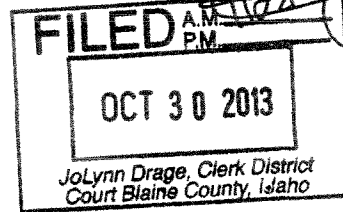
By:

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Date:

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Michael D. Gaffney, ISB No. 3558  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, Idaho 83404-7495  
Telephone: (208) 523-5171  
Facsimile: (208) 529-9732  
Email: gaffney@beardstclair.com



Attorney for Defendant

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterclaimant,

vs.

SUNRAIN VARIETIES LLC,

Defendant-Counterdefendant.

Case No.: CV-2013-644

ANSWER, COUNTERCLAIM AND  
JURY DEMAND

Filing Fee Category I1: \$66.00

The defendant, Sunrain Varieties LLC, by and through counsel of record, Beard St. Clair Gaffney PA, hereby answers the complaint filed by the plaintiff, Silver Creek Seed, LLC. Any paragraph not expressly admitted herein is denied.

**ANSWER**

1. The defendant admits paragraph 1.
2. The defendant admits paragraph 2.
3. The defendant denies paragraph 3.
4. The defendant denies paragraph 4.

5. The defendant denies paragraph 5.
6. The defendant denies paragraph 6.
7. The defendant denies paragraph 7.
8. The defendant denies paragraph 8.
9. The defendant denies paragraph 9.
10. The defendant denies paragraph 10.
11. The defendant denies paragraph 11.
12. The defendant denies paragraph 12.
13. The defendant denies paragraph 13.
14. The defendant denies paragraph 14.
15. The defendant denies paragraph 15.
16. The defendant denies paragraph 16.
17. The defendant denies paragraph 17.
18. The defendant denies paragraph 18.

#### **AFFIRMATIVE DEFENSES**

1. The plaintiff's claims are barred for failure to state a claim upon which relief can be granted.
2. The plaintiff's claims are barred by fraud.
3. The plaintiff's claims are barred because the defendant has fully performed its obligations under the contract, if any.
4. The plaintiff's claims are barred by its own breach of contract.
5. The plaintiff's claims are barred by the doctrine of waiver.
6. The plaintiff's claims are barred by the doctrine of estoppel.

7. The plaintiff's claims are barred by the doctrine of unclean hands.
8. The plaintiff's claims are barred by its own illegal conduct.
9. The plaintiff's claims are barred because the defendant's conduct is not the proximate cause of the plaintiff's damages, if any.
10. The plaintiff's claims are barred because its own conduct is the proximate cause of its damages, if any.
11. The plaintiff's claims are barred because it has no damages.
12. The plaintiff's claims are barred by the failure of consideration.
13. Venue is improper.
14. The plaintiff has failed to perform a condition precedent(s) to the contract excusing the defendant's performance.
15. The defendant has disclaimed any implied or express warranties.
16. The plaintiff has failed to mitigate its damages.
17. The defendant has partially paid its obligations, if any, under the contract.

#### **PRAYER FOR RELIEF**

The defendant asks the court for relief as follows:

1. For entry of judgment for the defendant and against the plaintiff with the plaintiff taking nothing thereby;
2. For dismissal of the plaintiff's complaint with prejudice;
3. Awarding the defendant its full attorney fees and costs per paragraph 7 of the Blanket Variety Contract between the parties, Idaho Code §12-120(3), Idaho Rule of Civil Procedure 54, and any other applicable rule or statute;
4. For any other relief deemed just and equitable.

## **COUNTERCLAIM**

The defendant-counterclaimant, SunRain, asserts as follows:

### **COUNT 1**

1. Paragraphs 1 through 18 of the Answer are re-pled and incorporated herein.
2. Silver Creek agreed to pay Sunrain for the subject seed potatoes sold to Silver Creek.
3. Silver Creek has failed to pay the amounts due and owing for delivery of the subject seed.
4. Silver Creek's failure to pay the amounts due and owing constitutes a breach of the agreement and payment on an open account.
5. Silver Creek's failure to pay the amounts due and owing constitutes damages in excess of the jurisdictional amount.
6. The transaction between Sunrain and Silver Creek constitutes a commercial transaction and this complaint constitutes an action on an open account per Idaho Code §12 – 120 (3) entitling Sunrain to recover attorney fees and costs required to prosecute this claim.

### **COUNT 2**

1. In May 2013, Silver Creek purchased seed potatoes from Sunrain on six separate occasions and more particularly described in Sunrain Invoices 102475 through 102480, attached as Exhibit A, Bates Nos. Sunrain 000001 through 000006 for convenience of the Court and parties.
2. The seed potatoes were timely delivered to Silver Creek.

3. Silver Creek has failed to make payment in any amount for Sunrain Invoices 102475 through 102480.

4. Silver Creek's failure to make payment the above – referenced invoices constitutes a breach of contract of an open account.

5. Silver Creek's failure to pay the amounts owing Sunrain has resulted in damages in excess of the jurisdictional amount.

6. The transaction between Sunrain and Silver Creek constitutes a commercial transaction and this complaint and constitutes action on an open account per Idaho Code §12 – 120 (3) entitling Sunrain to recover attorney fees and costs required to prosecute this claim.

#### **PRAYER FOR RELIEF**

The counterclaimant, Sunrain, asks the court for relief as follows:

1. For judgment in favor of Sunrain on Counts 1 and 2 in an amount to be determined at trial;

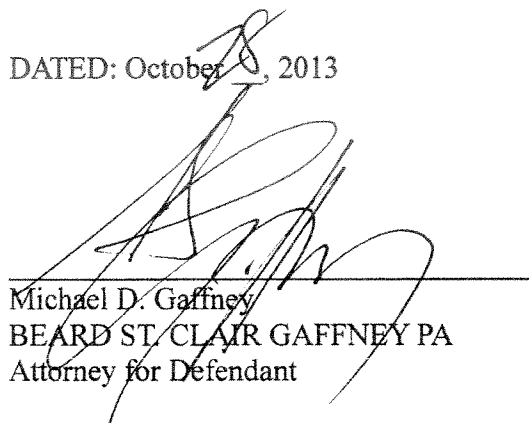
2. For an award of all attorney fees and costs incurred prosecuting this Counterclaim per paragraph 7 of the Blanket Variety Contract between the parties, Idaho Code §12 – 120 (3), and any other applicable rule or statute;

3. For any other relief deemed just and equitable.

#### **JURY DEMAND**

**DEFENDANT DEMANDS TRIAL BY JURY ON ALL TRIABLE ISSUES  
PURSUANT TO RULE 38 OF THE IDAHO RULES OF CIVIL PROCEDURE.**

DATED: October 28, 2013

  
Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

**CERTIFICATE OF MAILING**

I certify I am a licensed attorney in the state of Idaho and on October 28, 2013, I served a true and correct copy of the ANSWER, COUNTERCLAIM AND JURY DEMAND on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669



U.S. Mail



Hand-delivered



Facsimile

Blaine County Courthouse  
201 2<sup>nd</sup> Avenue S., Ste 106  
Hailey, ID 83333  
Fax: (208) 788-5527



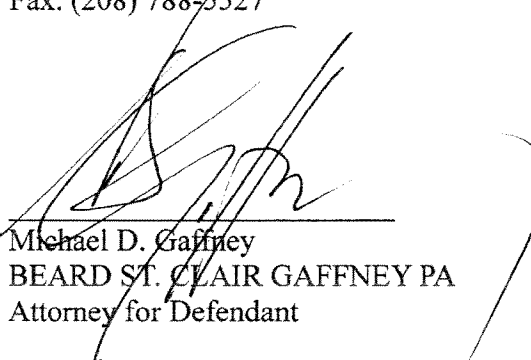
U.S. Mail



Hand-delivered



Facsimile

  
Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant



REMIT TO:  
**SUNRAIN VARIETIES LLC**  
 1210 Pler View Dr.  
 Idaho Falls, ID 83402

# INVOICE

NO.: 102475  
 DATE: Jul 03, 2013

PAYMENT TERMS: NET 10 DAYS

SHIPPING DATE: May 06, 2013

FREIGHT TERMS: FOB

BUYER I.D.: SILVER

P.O. #:

SOLD TO: SILVER CREEK SEED LLC  
 PO BOX 646  
 PICABO IDAHO 83348

SHIP TO: SILVER CREEK SEED LLC  
 19024 US HIGHWAY 20  
 CAREY IDAHO 83320

OUR ORDER NO.: 102475 SALESPERSON: JEFF BRAGG  
 BROKER:

INSPECTION: B/L: 102475  
 ROUTING:  
 LICENSE NO.: Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
SEED POTATOES BURBANK 100#SACK . E2 BULK	431.8	19.50	bag	8,420.10
SEED POTATO FREIGHT	1	1,950.00		1,950.00

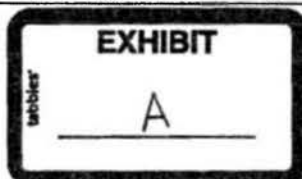
THE PERISHABLE AGRICULTURAL COMMODITIES LISTED ON THIS INVOICE ARE SOLD SUBJECT TO THE STATUTORY TRUST AUTHORIZED BY SECTION 5(c) OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 (7 U.S.C. 409(c)). THE SELLER OF THESE COMMODITIES RETAINS A TRUST CLAIM OVER THESE COMMODITIES, ALL INVENTORIES OF FOOD OR OTHER PRODUCTS DERIVED FROM THESE COMMODITIES, AND ANY RECEIVABLES OR PROCEEDS FROM THE SALE OF THESE COMMODITIES UNTIL FULL PAYMENT IS RECEIVED.

"In the event any action or proceeding is commenced to enforce the terms of this transaction or our PACA trust rights, buyer agrees to pay all costs of enforcement, including all reasonable attorneys' fees, together with any costs and expenses, as additional sums owed in connection with this transaction."

PLEASE INCLUDE COPY OF INVOICE WITH REMITTANCE. THE PURCHASE PRICE SHOWN ON THIS INVOICE MAY BE REDUCED BY A VOLUME INCENTIVE PLAN OR A PROMOTIONAL ALLOWANCE. ANY QUESTIONS REGARDING THIS INVOICE SHOULD BE DIRECTED TO: ACCOUNTS RECEIVABLE (208 524-1900)

Finance charges will accrue on any past-due balance at the rate of 1 1/2% per month (18% per annum) from the date each invoice becomes past due, or the maximum rate of interest allowable by law, and will be computed daily and compounded annually.

PLEASE PAY







# INVOICE

NO.: 102476  
DATE: Jul 03, 2013

REMIT TO:  
**SUNRAIN VARIETIES LLC**  
1210 Pier View Dr.  
Idaho Falls, ID 83402

PAYMENT TERMS: NET 10 DAYS  
SHIPPING DATE: May 06, 2013

BUYER I.D.: SILVER

P.O. #:

FREIGHT TERMS: FOB

SOLD TO: SILVER CREEK SEED LLC  
PO BOX 646  
PICABO IDAHO 83348

SHIP TO: SILVER CREEK SEED LLC  
19024 US HIGHWAY 20  
CAREY IDAHO 83320

OUR ORDER NO.: 102476 SALESPERSON: JEFF BRAGG  
BROKER:

INSPECTION: B/L: 102476  
ROUTING:  
LICENSE NO: Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
SEED POTATOES BURBANK 100#SACK . E2 BULK	441	19.50	bag	8,599.50
SEED POTATO FREIGHT	1	1,950.00		1,950.00

THE PERISHABLE AGRICULTURAL COMMODITIES LISTED ON THIS INVOICE ARE SOLD SUBJECT TO THE STATUTORY TRUST AUTHORIZED BY SECTION 5(c) OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 (7 U.S.C. 499e(c)). THE SELLER OF THESE COMMODITIES RETAINS A TRUST CLAIM OVER THESE COMMODITIES, ALL INVENTORIES OF FOOD OR OTHER PRODUCTS DERIVED FROM THESE COMMODITIES, AND ANY RECEIVABLES OR PROCEEDS FROM THE SALE OF THESE COMMODITIES UNTIL FULL PAYMENT IS RECEIVED.

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Finance charges will accrue on any past-due balance at the rate of 1 1/2% per month (18% per annum) from the date each invoice becomes past due, or the maximum rate of interest allowable by law, and will be computed daily and compounded annually.

PLEASE PAY



# INVOICE

NO.: 102477  
DATE: Jul 03, 2013

REMIT TO:  
**SUNRAIN VARIETIES LLC**  
1210 Pier View Dr.  
Idaho Falls, ID 83402

PAYMENT TERMS: NET 10 DAYS

SHIPPING DATE: May 07, 2013

BUYER I.D.: SILVER

P.O. #:

FREIGHT TERMS: FOB

SOLD TO: SILVER CREEK SEED LLC  
PO BOX 646  
PICABO IDAHO 83348

SHIP TO: SILVER CREEK SEED LLC  
19024 US HIGHWAY 20  
CAREY IDAHO 83320

OUR ORDER NO.: 102477 SALESPERSON: JEFF BRAGG  
BROKER:

INSPECTION: B/L: 102477

ROUTING:

LICENSE NO.:

Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
SEED POTATOES BURBANK 100#SACK . E2 BULK	428	19.50	bag	8,346.00
SEED POTATO FREIGHT	1	1,950.00		1,950.00

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PLEASE PAY



# INVOICE

NO.: 102478  
DATE: Jul 03, 2013

REMIT TO:  
**SUNRAIN VARIETIES LLC**  
1210 Pier View Dr.  
Idaho Falls, ID 83402

PAYMENT TERMS: NET 10 DAYS

SHIPPING DATE: May 07, 2013

BUYER I.D.: SILVER

P.O. #:

FREIGHT TERMS: FOB

SOLD TO: SILVER CREEK SEED LLC  
PO BOX 646  
PICABO IDAHO 83348

SHIP TO: SILVER CREEK SEED LLC  
19024 US HIGHWAY 20  
CAREY IDAHO 83320

OUR ORDER NO.: 102478 SALESPERSON: JEFF BRAGG  
BROKER:

INSPECTION: B/L: 102478  
ROUTING:  
LICENSE NO.: Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
SEED POTATOES BURBANK 100#SACK . E2 BULK	447.8	19.50	bag	8,732.10
SEED POTATO FREIGHT	1	1,950.00		1,950.00

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PLEASE PAY



# INVOICE

NO.: 102479  
DATE: Jul 03, 2013

REMIT TO:  
SUNRAIN VARIETIES LLC  
1210 Pier View Dr.  
Idaho Falls, ID 83402

PAYMENT TERMS: NET 10 DAYS

SHIPPING DATE: May 08, 2013

BUYER I.D.: SILVER

P.O. #:

FREIGHT TERMS: FOB

SOLD TO: SILVER CREEK SEED LLC  
PO BOX 646  
PICABO IDAHO 83348

SHIP TO: SILVER CREEK SEED LLC  
19024 US HIGHWAY 20  
CAREY IDAHO 83320

OUR ORDER NO.: 102479 SALESPERSON: JEFF BRAGG  
BROKER:

INSPECTION: B/L: 102479  
ROUTING:  
LICENSE NO.: Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
SEED POTATOES BURBANK 100#SACK . E2 BULK	437.6	19.50	bag	8,533.20
SEED POTATO FREIGHT	1	1,950.00		1,950.00

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PLEASE PAY



# INVOICE

NO.: 102480  
DATE: Jul 03, 2013

REMIT TO:  
SUNRAIN VARIETIES LLC  
1210 Pier View Dr.  
Idaho Falls, ID 83402

PAYMENT TERMS: NET 10 DAYS

SHIPPING DATE: May 08, 2013

BUYER I.D.: SILVER

P.O. #:

FREIGHT TERMS: FOB

SOLD TO: SILVER CREEK SEED LLC  
PO BOX 646  
PICABO IDAHO 83348

SHIP TO: SILVER CREEK SEED LLC  
19024 US HIGHWAY 20  
CAREY IDAHO 83320

OUR ORDER NO.: 102480 SALESPERSON: JEFF BRAGG  
BROKER:

INSPECTION: B/L: 102480  
ROUTING:  
LICENSE NO.: Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
SEED POTATOES BURBANK 100#SACK . E2 BULK	438.4	19.50	bag	8,548.80
SEED POTATO FREIGHT	1	1,950.00		1,950.00

THE PERISHABLE AGRICULTURAL COMMODITIES LISTED ON THIS INVOICE ARE SOLD SUBJECT TO THE STATUTORY TRUST AUTHORIZED BY SECTION 5(c) OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 (7 U.S.C. 499(c)). THE SELLER OF THESE COMMODITIES RETAINS A TRUST CLAIM OVER THESE COMMODITIES, ALL INVENTORIES OF FOOD OR OTHER PRODUCTS DERIVED FROM THESE COMMODITIES, AND ANY RECEIVABLES OR PROCEEDS FROM THE SALE OF THESE COMMODITIES UNTIL FULL PAYMENT IS RECEIVED.

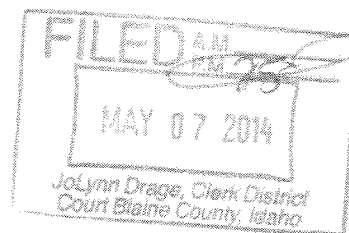
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PLEASE PAY

Andrew B. Wright [ISB No. 6812]  
WRIGHT BROTHERS LAW OFFICE, PLLC  
1166 Eastland Drive North, Suite A  
P.O. Box 226  
Twin Falls, ID 83303  
Telephone No. (208) 733-3107  
Facsimile No. (208) 733-1669  
e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )  
 )  
Plaintiff/Counterdefendant, )  
vs. )  
 )  
SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

Case No. CV-2013-644

**REPLY TO COUNTERCLAIM**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), as  
and for a Reply to the Counterclaim filed by Defendant/Counterclaimant Sunrain Varieties, LLC  
("Sunrain"), pleads and alleges as follows:

**FIRST DEFENSE**

Sunrain's Counterclaim, and each and every allegation contained therein, fails to state a  
claim against Silver Creek upon which relief can be granted.

**SECOND DEFENSE**

Silver Creek denies each and every allegation contained in Sunrain's Counterclaim,  
unless expressly and specifically hereinafter admitted.

1. With regards to Paragraphs 1, 3, 4, 5, 6 of Count 1 of Sunrain's Counterclaim, Silver Creek denies the allegations contained therein.

2. With regards to Paragraph 2 of Count 1 of Sunrain's Counterclaim, Silver Creek admits that the cost of the seed potatoes was paid/deducted from amounts owed by Sunrain to Silver Creek. Silver Creek denies the remaining allegations contained therein.

3. With regards to Paragraphs 1 and 2 of Count 2 of Sunrain's Counterclaim, Silver Creek admits that Sunrain delivered the seed potatoes that are the subject of the invoices attached to Sunrain's Counterclaim, which were paid/deducted from amounts owed by Sunrain to Silver Creek. Silver Creek denies the remaining allegations contained therein.

4. With regards to Paragraphs 3, 4, 5, and 6 of Count 2 of Sunrain's Counterclaim, Silver Creek denies the allegations contained therein.

### **THIRD DEFENSE**

Sunrain's claims are barred in whole or in part by the doctrines of waiver, estoppel, acceptance, offset, laches, lack of consideration, unclean hands, fraud, failure to mitigate, satisfaction, coercion, duress, failure to perform condition precedent, mistake, negligence, statute of limitations, statute of frauds, surrender, termination, forfeiture, consent, and unconscionability.

### **FOURTH DEFENSE**

Sunrain is not the real party in interest pursuant to I.R.C.P. 17 with regards to all or a portion of the damages alleged in the Counterclaim.

### **FIFTH DEFENSE**

Any and all of Sunrain's claims must be set off against damages Silver Creek incurred from Sunrain's conduct.

**SIXTH DEFENSE**

The conduct of Sunrain was unreasonable and constitutes a breach of the implied covenant of good faith and fair dealing, all of which bars recovery by Sunrain.

**SEVENTH DEFENSE**

Sunrain materially breached the parties' agreement by failing to pay Silver Creek and providing potatoes infected with bacterial ring rot, all of which bars recovery by Sunrain.

**DEMAND FOR JURY TRIAL**

Silver Creek requests a jury trial in this matter.

**PRAYER FOR RELIEF**

**WHEREFORE**, Silver Creek Seed, LLC prays for judgment as follows:

1. That Sunrain's Counterclaim be dismissed with prejudice and Sunrain take nothing thereunder;
2. That Silver Creek be awarded attorney fees incurred in defending this action, pursuant to Idaho Code §§ 12-120 and 12-121 and the parties' agreement;
3. That Silver Creek be awarded costs and disbursement necessarily incurred in defending this action, pursuant to I.R.C.P. 54; and
4. For such other and further relief as the Court may deem just and proper.

DATED this 5 day of May, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By:   
\_\_\_\_\_  
Andrew B. Wright  
Attorneys for Plaintiff/Counterdefendant



CERTIFICATE OF SERVICE

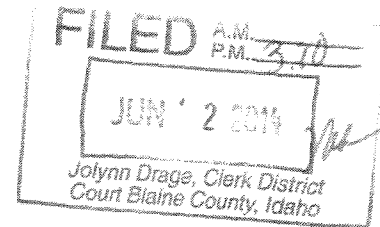
Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 6 day of May, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
☐ Express Mail  
☐ Hand Delivery  
☐ Facsimile- (208) 529-9732

  
\_\_\_\_\_  
Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
 WRIGHT BROTHERS LAW OFFICE, PLLC  
 1166 Eastland Drive North, Suite A  
 P.O. Box 226  
 Twin Falls, ID 83303  
 Telephone No. (208) 733-3107  
 Facsimile No. (208) 733-1669  
 e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
 limited liability company, )  
 )  
 Plaintiff/Counterdefendant, )  
 vs. )  
 )  
 SUNRAIN VARIETIES, LLC, a Delaware )  
 limited liability company, )  
 )  
 Defendant/Counterclaimant. )

Case No. CV-2013-644

**MOTION FOR PARTIAL SUMMARY  
 JUDGMENT**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), by and through its attorney Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby submits this *Motion for Partial Summary Judgment*.

This motion is supported by the filings and pleadings in this matter, including without limitation, the *Memorandum in Support of Motion for Partial Summary Judgment* and the *Affidavit of Mark Johnson in Support of Motion for Summary Judgment*, as well as the pleadings and the Court's file in this matter.

Silver Creek requests partial summary judgment on the amount it is owed from Sunrain for the Silver Creek potatoes taken by Sunrain.

Oral argument is requested.

DATED this 2 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: 

Andrew B. Wright

Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

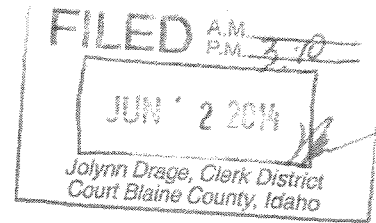
Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 2 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
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☒ E-mail

  
Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
 WRIGHT BROTHERS LAW OFFICE, PLLC  
 1166 Eastland Drive North, Suite A  
 P.O. Box 226  
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 Telephone No. (208) 733-3107  
 Facsimile No. (208) 733-1669  
 e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
 limited liability company, )  
 )  
 Plaintiff/Counterdefendant, )  
 vs. )  
 )  
 SUNRAIN VARIETIES, LLC, a Delaware )  
 limited liability company, )  
 )  
 Defendant/Counterclaimant. )

Case No. CV-2013-644

**NOTICE OF HEARING**

**(Motion for Partial Summary Judgment)**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC, by and through its attorney of record, Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby provide notice that on **June 30, 2014, at 3:00 p.m.** in the District Courtroom at the Blaine County Courthouse, Hailey, Idaho, the Plaintiff/Counterdefendant Silver Creek Seed, LLC's *Motion for Partial Summary Judgment* will be heard before the Honorable Robert J. Elgee.

DATED this 2 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC


By:   
 Andrew B. Wright  
 Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

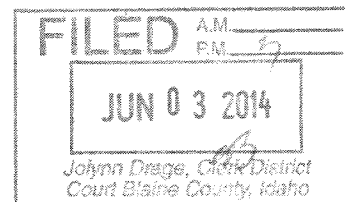
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☒ E-mail

  
\_\_\_\_\_  
Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
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 Telephone No. (208) 733-3107  
 Facsimile No. (208) 733-1669  
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Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
 limited liability company, )

Plaintiff/Counterdefendant, )

vs. )

SUNRAIN VARIETIES, LLC, a Delaware )  
 limited liability company, )

Defendant/Counterclaimant. )

Case No. CV-2013-644

**AMENDED MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), by and through its attorney Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby submits this *Amended Motion for Partial Summary Judgment*.

This motion is supported by the filings and pleadings in this matter, including without limitation, the *Memorandum in Support of Amended Motion for Partial Summary Judgment* and the *Affidavit of Mark Johnson in Support of Motion for Summary Judgment*, as well as the pleadings and the Court's file in this matter.

Silver Creek requests partial summary judgment that, as a matter of law, Sunrain Varieties, LLC ("Sunrain") is obligated to pay the contract rate for certain potatoes pursuant to a contract between the parties.

Oral argument is requested.

DATED this 3 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: 

Andrew B. Wright

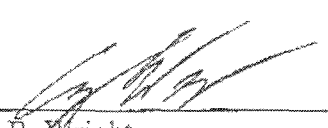
Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

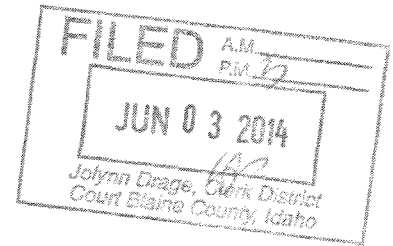
Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 3 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

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Andrew B. Wright

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Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
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SILVER CREEK SEED, LLC, an Idaho  
 limited liability company,

Plaintiff/Counterdefendant,

vs.

SUNRAIN VARIETIES, LLC, a Delaware  
 limited liability company,

Defendant/Counterclaimant.

Case No. CV-2013-644

**NOTICE OF HEARING**

**(Amended Motion for Partial Summary  
 Judgment)**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC, by and through its attorney of record, Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby provide notice that on **June 30, 2014, at 3:00 p.m.** in the District Courtroom at the Blaine County Courthouse, Hailey, Idaho, the Plaintiff/Counterdefendant Silver Creek Seed, LLC's *Amended Motion for Partial Summary Judgment* will be heard before the Honorable Robert J. Elgee.

DATED this 3 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By:   
 Andrew B. Wright  
 Attorneys for Plaintiff/Counterdefendant

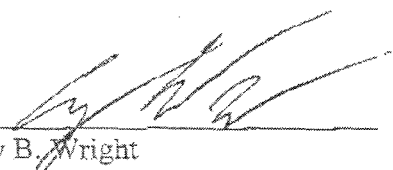


CERTIFICATE OF SERVICE

Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 3 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

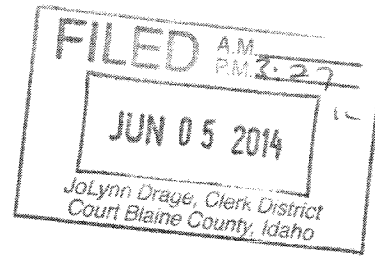
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\_\_\_\_\_  
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Attorneys for Plaintiff/Counterdefendant



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )  
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Plaintiff/Counterdefendant, )  
vs. )  
 )  
SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

Case No. CV-2013-644

**MEMORANDUM IN SUPPORT  
OF AMENDED MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), by and through its attorney Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby submits this *Memorandum in Support of Amended Motion for Partial Summary Judgment*.

**I. ISSUES**

The issues in the above-entitled matter relate to a contract between Silver Creek and Sunrain Varieties, LLC ("Sunrain"), which contract provided that 1) Sunrain would provide seed potatoes to Silver Creek, 2) Silver Creek would plant, grow, and harvest the seed potatoes, and 3) Sunrain would then purchase the seed potatoes from Silver Creek. This litigation arose because

of the discovery of bacterial ring rot in some of the above-described potatoes and Sunrain's subsequent refusal to pay Silver Creek for the potatoes.

At trial, the parties will present evidence concerning the source of the bacterial ring rot (Sunrain), damages incurred by Silver Creek, etc. However, for the purposes of this summary judgment, the undisputed factual evidence shows that 1) the non-infected potatoes met the certification requirements of the parties' contract, 2) Sunrain took and accepted a portion of the potatoes and sold them to a 3<sup>rd</sup> party buyer prior to the discovery of bacterial ring rot, and 3) Sunrain took and accepted an additional portion of the potatoes and sold them to a 3<sup>rd</sup> party buyer after the discovery of bacterial ring rot. As such, the following questions of law are before the Court:

- 1) If a purchase and sale contract provides that a farmer (Silver Creek) will provide seed potatoes that meet "certification requirements," can a buyer (Sunrain) refuse to purchase the farmer's certified seed potatoes that are free of bacterial ring rot if there is bacterial ring rot in the farmer's other potatoes?
- 2) Under the UCC, can a buyer (Sunrain) take potatoes from a farmer (Silver Creek), re-sell the potatoes to a 3<sup>rd</sup> party, keep the proceeds received from the 3<sup>rd</sup> party sale, and then reject the farmer's potatoes due to alleged "non-conformity?"
- 3) Under the UCC, after knowing of the alleged "non-conformity," can a buyer (Sunrain) take potatoes from a farmer (Silver Creek), re-sell the potatoes to a 3<sup>rd</sup> party, keep the proceeds received from the 3<sup>rd</sup> party sale, and then reject the farmer's potatoes?
- 4) Under the UCC, can a buyer (Sunrain) avoid paying the contract rate to the farmer (Silver Creek) for accepted goods if the buyer is unable to re-sell them at a higher rate?

If the Court answers "no" to any of the above-described questions of law, Silver Creek requests that partial summary judgment be granted as to whether Sunrain has to pay Silver Creek for those potatoes at the parties' contractual rate.

## II. STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). The non-moving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). “A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005).

## III. BRIEF OVERVIEW OF SEED POTATO BUSINESS

All potatoes sold for planting in Idaho must be certified and accompanied with a plant health certificate,<sup>1</sup> which verifies the certification and identifies the specific “seed lot” using a certification number. The Idaho Crop Improvement Association, Inc. (the “ICIA”) sets the rules and administers this certification process. *Affidavit of Mark Johnson in Support of Motion for Partial Summary Judgment* (the “Johnson Aff.”), ¶18. ICIA’s classification scheme in the above-described process is based on the number of field production years for each seed lot. *Johnson Aff.*, ¶18 at I.B.4 (p.2) and II.A (p. 7). Seed lots from each production year carry a different designation (Nuclear, Generation 1, Generation 2, Generation 3, etc.) depending on the number of years that seed lot has been in production. *Johnson Aff.*, ¶18 at II.A.1 (p. 7). As such, ICIA is able to monitor and track each seed lot throughout each growing season.

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<sup>1</sup> Idaho Code § 12-503.

Of particular relevance to this motion, ICIA's rules provide a detailed structure to address the discovery of bacterial ring rot in a seed lot. Specifically, ICIA provides that bacterial ring rot is a "zero tolerance" factor- meaning that any seed lot infected with bacterial ring rot is disqualified for certification. *Johnson Aff.*, ¶18 at I.C.12 (p. 5). In addition, in the event bacterial ring rot is discovered in one of the farmer's various seed lots, the ICIA also addresses the status of the farmers' non-infected seed lots, which it refers to as "contact lots" (seed lots produced on a farming operation using common production, handling equipment, and/or storage facilities). *Johnson Aff.*, ¶18 at I.B.10 (p. 3). Specifically, ICIA provides as follows:

Contact lots shall remain eligible for certification provided that a laboratory test is negative for bacterial ring rot prior to final certification. A random sample of 1200 stems or tubers shall be required for seed lots that are ten acres or greater.

*Johnson Aff.*, ¶18 at VI.J.4.b.i. (p. 16).

To illustrate the above-described rule, if a farmer discovers bacterial ring rot in Lot A, the farmer does not lose certification on his entire crop- so long as the testing on Lots B, C, D, etc. show that these lots are free from bacterial ring rot. However, even though the ICIA allows the farmer to sell non-infected Lots B, C, D, etc. as certified seed, it limits the ability of the 3<sup>rd</sup> party buyer to then re-certify the seed the following year. *See Johnson Aff.*, ¶18 at III.E. (p. 13). As such, the ICIA makes a clear distinction between certified seed potatoes (potatoes that can be sold and used as seed potatoes) and certified seed potatoes that can be re-certified the following year. *See Johnson Aff.*, ¶18 at I.A.2 (p. 1) and I.A.7. (p. 1).

Though this is discussed in detail below, the above-described ICIA framework is relevant to our matter because Sunrain's grower contract provided that Silver Creek's potatoes would pass the "certification requirements." However, even though Silver Creek's contact lots were free of bacterial ring rot and certifiable, Sunrain still refused to pay Silver Creek.

#### IV. FACTUAL BACKGROUND

Mark Johnson, who has worked as both an employee and owner in the seed potato business for approximately 27 years, formed Silver Creek in March, 2006. *Johnson Aff.*, ¶¶4–5. Prior to receiving the Sunrain potatoes involved in this litigation, Silver Creek never had any issues with bacterial ring rot. *Johnson Aff.*, ¶6.

On May 10, 2012, Silver Creek and Sunrain entered into Sunrain’s grower contract (the “Contract”), pursuant to which Sunrain agreed to 1) provide specific varieties of its proprietary certified seed potatoes, the 84180, Red Fantasy, Laura, Annabelle, Rumba, Allians, and Carrera (collectively, the “Potatoes”) to Silver Creek, and 2) purchase the Potatoes from Silver Creek after the 2012 crop year. *Johnson Aff.*, ¶¶11-12. In addition, the Contract provided that the Potatoes would meet the certification requirements of the State of Idaho, and Silver Creek could not sell the Potatoes to any other party without Sunrain’s written consent. *Johnson Aff.*, ¶11.

After entering into the Contract, Silver Creek grew the Potatoes during the 2012 growing season. *Johnson Aff.*, ¶12. After the 2012 harvest, Silver Creek stored the Potatoes and Sunrain began picking up its potatoes in the Spring of 2013. *Johnson Aff.*, ¶12. In March of 2013, Sunrain sent trucks to Silver Creek’s cellar, took delivery of some of the 84180 variety (the “1<sup>st</sup> Lot”), and sold the 1<sup>st</sup> Lot to a 3<sup>rd</sup> party farmer. *See Johnson Aff.*, ¶19. The 1<sup>st</sup> Lot was visually inspected by authorized crop inspectors prior to shipping, who determined that the 1<sup>st</sup> Lot met the quality standards to be certified. *Johnson Aff.*, ¶20.

On or about March 29, 2013, a sample from the remaining 84180 potatoes (that were not previously sold to the above-described 3<sup>rd</sup> party farmer) tested positive for *Clavibacter michiganensis* subs. *Spedonicus* (referred to as “bacterial ring rot”). *Johnson Aff.*, ¶¶13–14. Silver Creek and Sunrain discussed that positive test result at that time. *Johnson Aff.*, ¶13. As a

result, Silver Creek underwent extensive testing on all of the Potatoes. On April 3, 2013, Silver Creek sent 1,500 tuber samples of the 84180 variety; 2,200 tuber samples each of the Red Fantasy, Laura, Annabelle, Rumba, and Allians varieties; and 400 tuber samples of the Carrera variety to Agdia and North Dakota State University for PCR testing. *Johnson Aff.*, ¶15. The 84180 and Rumba varieties (collectively, the “Infected Potatoes”) tested positive for bacterial ring rot, while the Red Fantasy, Laura, Annabelle, Allians, and Carrera varieties (collectively, the “Non-Infected Potatoes”) tested negative for bacterial ring rot. *Johnson Aff.*, ¶¶15–17.<sup>2</sup>

After Sunrain knew about the positive tests for bacterial ring rot in the Infected Potatoes, Sunrain again sent trucks to Silver Creek’s storages and took delivery of the majority of the remaining Potatoes (collectively, the “2<sup>nd</sup> Lot”). *Johnson Aff.*, ¶21. Thereafter, Sunrain sold the 2<sup>nd</sup> Lot as cattle feed to a 3<sup>rd</sup> party. *See Johnson Aff.*, ¶21. Despite taking delivery of the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot and then selling them to 3<sup>rd</sup> parties, Sunrain refuses to pay Silver Creek for all those seed potatoes under the Contract. *Johnson Aff.*, ¶22.

For the purposes of overall factual context (though perhaps not directly relevant to this motion for summary judgment), the apparent source of the subject bacterial ring rot can be traced to a farm in Washington. Specifically, Ebe Farms, LLC (“Ebe Farms”) grew the 2<sup>nd</sup> generation of the 84180 variety, described as Washington Lot No. 10-04-32-G2, in Washington in 2010. *Johnson Aff.*, ¶7. Thereafter, Potandon Produce, Inc., the parent corporation of Sunrain, imported the 84180 lot from Ebe Farms and provided it to Sunrain, which grew the 3<sup>rd</sup> generation of 84180 in Nevada during the 2011 growing season. *Johnson Aff.*, ¶8. In October 2011, Sunrain shipped the 84180 lot, described as Nevada Lot No. 1131, from Nevada to Silver

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<sup>2</sup> Silver Creek notes that the 1,500 tuber sample of the 84180 and 2,200 sample of Rumba varieties both tested negative for bacterial ring rot at Agdia, which appeared to use a different method of PCR testing than the other testing entities. *Johnson Aff.*, ¶16. However, the 84180 and Rumba varieties both tested positive for bacterial ring rot at North Dakota State University. *Johnson Aff.*, ¶17.

Creek in Idaho for storage. *Johnson Aff.*, ¶9. On November 18, 2011, potatoes from Ebe Farms tested positive for bacterial ring rot. *Johnson Aff.*, ¶10. However, Sunrain never told Silver Creek that the 84180 lot came from a farm that was infected with bacterial ring rot. *Johnson Aff.*, ¶10.

## V. ANALYSIS

**A. If a purchase and sale contract provides that a farmer (Silver Creek) will provide seed potatoes that meet “certification requirements,” can a buyer (Sunrain) refuse to purchase the farmer’s certified seed potatoes that are free of bacterial ring rot if there is bacterial ring rot in the farmer’s other potatoes?**

The rights and liabilities of parties under a contract are established and limited by the terms of the contract entered into by the parties. *Pern v. Stocks*, 93 Idaho 866, 868, 477 P.2d 108, 110 (1970). A breach of a contract occurs when there is non-performance of any contractual duty of immediate performance. *Indep. Lead Mines v. Hecla Mining Co.*, 143 Idaho 22, 28, 137 P.3d 409, 415 (2006). Whether there has been performance of contractual obligations or a breach of the contract is determined by review of the contract because a contract must be given effect and enforced according to its terms. *See Borchert v. Hecla Min. Co.*, 109 Idaho 482, 485, 708 P.2d 887, 890 (1985); *Minidoka County for Use and Benefit of Detweiler Bros., Inc. v. Krieger*, 88 Idaho 395, 417, 399 P.2d 962, 976 (1964) (Contracts must be enforced according to their plain language and terms.).

In our case, the Contract provided that Sunrain would purchase the Potatoes from Silver Creek and that the Potatoes “shall conform to [ICIA] standards for the generations being delivered to Sunrain,” and must meet the Idaho “certification requirements.” *Johnson Aff.*, ¶11. Pursuant to the ICIA rules, a seed lot infected with bacterial ring rot is not eligible for seed potato certification. *Johnson Aff.*, ¶18 at I.C.12. (p. 5). As such, the Infected Potatoes were not eligible for certification. However, the ICIA rules also provide that all contact lots (defined as “a



seed lot produced on a farming operation using common production and handling equipment and/or storage facilities”) “shall remain eligible for certification provided that a laboratory test is negative for bacterial ring rot prior to final certification.” *Johnson Aff.*, ¶18 at VI.J.4.B.i. (p. 16). The laboratory test is to be done on a random sample of 1,200 stems or tubers for seed lots that are 10 acres or larger.<sup>3</sup> *Johnson Aff.*, ¶18 at VI.J.4.B.i. (p. 16).

Subsequent to discovering that the 84180 variety it had grown was infected with bacterial ring rot, Silver Creek sent 1,500 tuber samples of the 84180 variety; 2,200 tuber samples each of the Red Fantasy, Laura, Annabelle, Rumba, and Allians varieties; and 400 tuber samples of the Carrera variety (a smaller overall lot) to Agdia and North Dakota State University for PCR testing. *Johnson Aff.*, ¶15. As a result of that testing, the Infected Potatoes tested positive for bacterial ring rot. *Johnson Aff.*, ¶¶15–17. However, the Non-Infected Potatoes all tested negative for bacterial ring rot. *Johnson Aff.*, ¶¶15–17. Consequently, per the ICIA rules, the Non-Infected Potatoes remained eligible for certification despite the presence of bacterial ring rot in the Infected Potatoes. Consequently, the Non-Infected Potatoes meet the quality standards required by the Contract. As such, Sunrain is obligated to pay Silver Creek the Contract price for the Non-Infected Potatoes.

**B. Under the UCC, can a buyer (Sunrain) take potatoes from a farmer (Silver Creek), re-sell the potatoes to a 3<sup>rd</sup> party, keep the proceeds received from the 3<sup>rd</sup> party sale, and then reject the farmer’s potatoes due to alleged “non-conformity?”**

In a contract for the sale of goods, a buyer has three choices once the goods have been tendered: “(a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.” Idaho Code § 28-2-601. If the buyer rejects the goods, he must notify the seller of such rejection within a reasonable time after their deliver or tender. Idaho Code §

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<sup>3</sup> For seed lots less than 10 acres the sample size is determined by the certification agency. *Johnson Aff.*, ¶18 at VI.J.4.B.i (p. 16).

25-2-602. A mere expression by the buyer that the goods are nonconforming does not operate as a rejection. *Figueroa v. Kit-San Co.*, 123 Idaho 149, 158, 845 P.2d 567, 576 (Ct. App. 1992). Rather, “the buyer must take affirmative action to avoid acceptance.” *Id.* at 157 (citing Idaho Code § 28-2-602 cmt. 1).

Conversely, a buyer may choose to accept all or part of the goods despite their failure to conform to the contract. Idaho Code § 28-2-601. Such acceptance can be shown in a number of ways, and Idaho statutes specifically provide that

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of section 28-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Idaho Code § 28-2-606.

In addition to the methods of acceptance provided in Idaho Code section 28-2-606, a buyer may signify his acceptance of delivered goods by keeping such goods without notice of rejection and appropriating them to his own use. *Mohr v. Shultz*, 86 Idaho 531, 538, 388 P.2d 1002, 1007 (1964). In that case, the buyer took possession of a bakery oven and other baking equipment from a seller. *Id.* at 534. Over the following months, a conflict between the parties arose as to the price of some of the baking equipment and whether the parties subsequently agreed to, or actually did, rescind the sales agreement; nevertheless, the buyer maintained possession of the oven and used it in its bakery business throughout the dispute before finally

returning it to the seller. *Id.* at 534–35. The Supreme Court deemed the buyer to have accepted the oven and become obligated to pay for it under the contract because he received it and then used it in his own business. *See id.* at 538.

Further, when a buyer resells delivered goods for profit or as part of its business, courts have found that the buyer's actions result in acceptance of the goods. *See Borges v. Magic Valley Foods, Inc.*, 101 Idaho 494, 496–97, 615 P.2d 273, 275–76 (1980) (a buyer's resale of goods for profit in the course of its business is inconsistent with the seller's ownership of the goods and results in the acceptance of the goods); *see also Bicknell v. Owyhee Sheep & Land Co.*, 31 Idaho 696, 176 P. 782, 783–84 (1918) (when a buyer of goods under a contract offers to sell the goods which he has contracted to purchase, the buyer actions constitute acceptance of the goods).

Silver Creek and Sunrain entered into the Contract pursuant to which Silver Creek would cut and grow the Potatoes and then sell them to Sunrain. *See Johnson Aff.*, ¶11. The Contract further provided that the Potatoes must meet certain quality standards. *Johnson Aff.*, ¶11. The Potatoes were to be stored in facilities owned by Silver Creek and Sunrain was to take delivery of the Potatoes with its trucks at Silver Creek's storages. *Johnson Aff.*, ¶11. In 2012, Silver Creek cut, grew, harvested, and then stored the Potatoes in its storages as called for by the Contract. *Johnson Aff.*, ¶12. In early March 2013, Sunrain's trucks arrived at Silver Creek's storages to take possession of the 1<sup>st</sup> Lot. *Johnson Aff.*, ¶19. Those potatoes were inspected by authorized crop inspectors prior to shipping, who did not detect bacterial ring rot in the 1<sup>st</sup> Lot and found that the 1<sup>st</sup> Lot meet the quality standards to be certified. *See Johnson Aff.*, ¶20. Sunrain's trucks then took the 1<sup>st</sup> Lot away from Silver Creek's storages and sold those seed potatoes to another farmer. *See Johnson Aff.*, ¶19.

As explained above, such action (keeping delivered goods without notice of rejection and appropriating them to one's own use, or reselling delivered goods as part of a business) constitutes acceptance of goods under Idaho law. It is undisputed Sunrain's business involved the selling and delivery of certified seed potatoes to commercial growers. Further, it is undisputed that Sunrain took delivery of the 1<sup>st</sup> Lot from Silver Creek in the manner called for in the Contract and then re-sold and shipped those seed potatoes to another potato grower as part of its business of supplying certified potato seed to commercial growers. *See Johnson Aff.*, ¶19. Additionally, at no time did Sunrain inform Silver Creek that it rejected or refused to accept the 1<sup>st</sup> Lot, or that it was revoking its acceptance of the 1<sup>st</sup> Lot. *Johnson Aff.*, ¶23. Based on the foregoing, there is no genuine dispute precluding summary judgment on the issue that Sunrain accepted the 1<sup>st</sup> Lot.

**C. Under the UCC, after knowing of the alleged "non-conformity," can a buyer (Sunrain) take potatoes from a farmer (Silver Creek), re-sell the potatoes to a 3<sup>rd</sup> party, keep the proceeds received from the 3<sup>rd</sup> party sale, and then reject the farmer's potatoes?**

The Idaho Supreme Court has noted that "[g]enerally, a buyer is deemed to have accepted defective goods when, knowing of the defect, he resells the goods without notifying the seller" because that is an act inconsistent with the seller's ownership *Borges*, 101 Idaho at 496–97; *see also Bicknell*, 31 Idaho 696, 176 P. at 783–84 (when a buyer of goods under a contract offers to sell the goods which he has contracted to purchase, the buyer's actions constitute an acceptance of the goods). Acts inconsistent with the seller's ownership, or communications of acceptance, bind the buyer to accepting the goods despite any prior insistence that the goods were rejected. Idaho Code § 28-2-607 cmt. 4. In the context of potatoes, it is established under Idaho law that knowingly taking delivery of nonconforming potatoes, reselling such potatoes, and/or failing to reject deliveries of such potatoes constitutes acceptance of those nonconforming potatoes for

purposes of a contract related to the potatoes. *See e.g., Borges*, 101 Idaho at 496–97; *Lickley v. Max Herbold, Inc.*, 133 Idaho 209, 212, 984 P.2d 697, 700 (1999); *G & H Land & Cattle Co. v. Heitzman & Nelson Inc.*, 102 Idaho 204, 209–10, 628 P.2d 1038, 1043–44 (1981).

For example, in *Borges* the Idaho Supreme Court dealt with concept of acceptance of goods as applied to a potato grower contract involving nonconforming potatoes. In that case, a potato grower contracted to sell a certain amount of potatoes to a purchaser who planned to then ship the potatoes as fresh pack grade. *Borges*, 101 Idaho at 495. The contract provided that if the potatoes were unfit for fresh pack shipping the contract was void. *Id.* After inspection of the potatoes, it was discovered that a portion of the potatoes suffered from a defect that prevented them being able to be shipped under the fresh pack grade. *Id.* Nonetheless, the buyer took possession of all of the potatoes. *See id.* After a failed attempt to blend the affected potatoes with non-affected potatoes in hopes that the blend would meet fresh pack grade standards, the buyer simply processed the affected potatoes into flakes and sold them for substantially less than the contract price. *Id.* at 496. The Court held that the buyer’s “use of the potatoes in the ordinary course of its own business (presumably for profit) was an act inconsistent with the seller’s ownership, and constituted an acceptance of the goods” under Idaho Code section 28-2-606(1)(c). *Id.* at 497; *see also Lickley*, 133 Idaho at 212 (by taking delivery of truck-loads of potatoes and comingling them with other potatoes it had bought, a buyer accepts the loads of potatoes).

Our case presents a similar factual circumstance. Silver Creek and Sunrain entered into the Contract pursuant to which Silver Creek would cut, grow, and then store the Potatoes for Sunrain, who would then purchase the Potatoes from Silver Creek and take delivery of them with

its own trucks at Silver Creek's storages. *Johnson Aff.*, ¶11. The Contract further provided that the Potatoes must meet certain size and quality standards. *Johnson Aff.*, ¶11.

In 2012, Silver Creek cut, grew, harvested, and then stored the Potatoes in its storages as called for by the Contract. *Johnson Aff.*, ¶12. On or about March 29, 2013, Silver Creek and Sunrain learned that the 84180 variety were infected with bacterial ring rot. *Johnson Aff.*, ¶¶13. Seed potatoes containing bacterial ring rot cannot be certified and did not meet the quality standards called for in the Contract. Sunrain was aware of the positive test for bacterial ring rot in the 84180 variety on or about March 29, 2013, and thus knew at that time that the 84180 variety, and potentially all of the Potatoes (in the event contact lots did not pass laboratory testing), may not be certifiable. *See Johnson Aff.*, ¶13.

The Contract also called for delivery to take place aboard Sunrain's trucks at Silver Creek's storages. *Johnson Aff.*, ¶11. As explained above, Sunrain took delivery of the 1<sup>st</sup> Lot in the manner called for in the Contract and then shipped and sold those seed potatoes to another potato farmer. *Johnson Aff.*, ¶19. Likewise, after learning of the bacterial ring rot in some of the Potatoes, Sunrain took delivery of the 2<sup>nd</sup> Lot as called for in the Contract. *See Johnson Aff.*, ¶21. At that time, Sunrain knew that some of the Infected Potatoes were infected with bacterial ring rot and that it was possible that none of the Potatoes would conform to the Contract, but Sunrain nonetheless exercised dominion over the 2<sup>nd</sup> Lot by taking delivery of those seed potatoes and selling them to third parties.

It is undisputed that Sunrain took delivery of 2<sup>nd</sup> Lot. Further, it is undisputed that at the time Sunrain took delivery of the 2<sup>nd</sup> Lot, Sunrain knew of the presence of bacterial ring rot in some of the Potatoes. Accordingly, Sunrain's actions as to the 2<sup>nd</sup> Lot must be construed as signifying that Sunrain was retaining those seed potatoes in spite of any nonconformity (either

actual or presumed). Moreover, Sunrain's use and/or resale of the 2<sup>nd</sup> Lot—and Sunrain's retention of any proceeds from such use—is an act inconsistent with Silver Creek's ownership of the 2<sup>nd</sup> Lot. Such acts constituted acceptance of the 2<sup>nd</sup> Lot by Sunrain. Idaho Code § 28-2-606(1)(c); *Borges*, 101 Idaho at 497. Further, those actions would control over any prior insistence or indication that that Sunrain rejected the 2<sup>nd</sup> Lot. *See Idaho Code* § 28-2-607 cmt. 4. Finally, the acceptance of the 2<sup>nd</sup> Lot was made with knowledge of the bacterial ring rot in some of the Potatoes, so Sunrain could not subsequently revoke that acceptance on account of the bacterial ring rot. Idaho Code § 28-2-607(2); *Beal v. Griffin*, 123 Idaho 445, 449, 849 P.2d 118, 122 (Ct. App. 1993).

Based on the foregoing, there is no genuine dispute precluding this Court from finding that Sunrain accepted the 2<sup>nd</sup> Lot under the Contract.

**D. Under the UCC, can a buyer (Sunrain) avoid paying the contract rate to the farmer (Silver Creek) for accepted goods if the buyer is unable to re-sell them at a higher rate?**

Idaho law is clear and unequivocal, once a buyer has accepted goods he must pay the contract rate for those goods. Idaho Code § 28-2-607(1); *Lickley* 133 Idaho at 212; *G & H Land & Cattle Co.*, 102 Idaho at 209–10 (even when an entire crop of potatoes to a contract were nonconforming, loads that were accepted by the buyer must be paid for at the contract price). It does not matter that the goods are ultimately resold at a price lower than the contract price. *See Borges*, 101 Idaho at 496–97. In fact, courts have not hesitated to apply section 28-2-607(1) to nonconforming potatoes subject to a contract and accepted by a buyer, even when the potatoes were subsequently resold for less than the contract price.

For example, in *Borges* the potato grower and the purchaser agreed to a contract with a purchase price of \$3.80 per cwt for the subject potatoes. *Borges*, 101 Idaho at 495. As explained

above, the potatoes turned out to be defective and unfit for the purpose which the buyer bought them for. *Id.* at 495–96. Nonetheless, the buyer kept the potatoes and processed them into flakes, which the buyer then sold for \$1.25 per cwt. *Id.* at 496. The grower demanded that the buyer pay the contract price of \$3.80 per cwt for the potatoes sold as flakes, but the buyer was only willing to pay \$1.25 per cwt. *Id.* In the ensuing litigation, it was ultimately decided that the buyer accepted the potatoes by using them in the course of its business (i.e. reselling them). *Id.* at 497. As a result of that acceptance, the Idaho Supreme Court held that the buyer was liable to the seller for the full contract price even though the buyer ultimately resold the potatoes for less than the contract price. *Id.*

Based on the foregoing, it is plain that potatoes subject to a contract and subsequently accepted by the buyer must be paid for at the contract rate. Further, the fact that accepted potatoes are nonconforming, ultimately worth less than anticipated, or sold by the buyer for less than the buyer would have if the potatoes were as contracted for does not relieve the buyer from paying the price agreed to in the contract. *Id.* at 496–97; *see also G & H Land & Cattle*, 102 Idaho at 209–10.

In the present case, the evidence clearly shows that Silver Creek cut and grew the Potatoes and then Sunrain took delivery of the 1<sup>st</sup> Lot and the 2<sup>nd</sup> Lot. *Johnson Aff.*, ¶¶19, 21. Sunrain then sold those potatoes to third parties, including selling the 2<sup>nd</sup> Lot as cattle feed. *See Johnson Aff.*, ¶¶19, 21. Sunrain retained the entire sum it received for its resale of the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot and refused to pay for all of the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot as called for by the Contract. *Johnson Aff.*, ¶22. The amount Sunrain ultimately received from reselling the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot does not absolve Sunrain from paying Silver Creek for those potatoes at the rate contained in the Contract, even if the contract rate is higher than the amount Sunrain received from reselling those potatoes.



Sunrain accepted the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot and is obligated to pay for those seed potatoes at the rate provided in the Contract. Idaho Code § 28-2-607(1).

## VI. CONCLUSION

Based on the foregoing, the undisputed evidence plainly establishes that Silver Creek performed its obligations under the Contract with regard to the Non-Infected Potatoes. Consequently, there is no genuine issue of material fact as to Sunrain's liability under the Contract for the Non-Infected Potatoes. As such, Silver Creek requests that the Court find, as a matter of law, that Sunrain is obligated to pay the Contract rate for the Non-Infected Potatoes.

Furthermore, Sunrain accepted the 1<sup>st</sup> Lot by acting inconsistent with Silver Creek's ownership of those potatoes. Similarly, Sunrain knew of the bacterial ring rot in some of the Potatoes but nonetheless accepted the 2<sup>nd</sup> Lot by taking delivery and acting inconsistent with Silver Creek's ownership of those potatoes. Consequently, there is no genuine issue of material fact as to Sunrain's liability under the Contract for both the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot. As such, Silver Creek also requests that the Court find, as a matter of law, that Sunrain is obligated to pay the Contract rate for the 1<sup>st</sup> Lot and 2<sup>nd</sup> Lot.

DATED this 3 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: \_\_\_\_\_

Andrew B. Wright

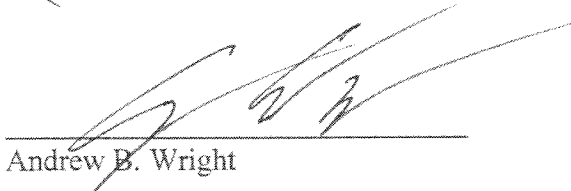
Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

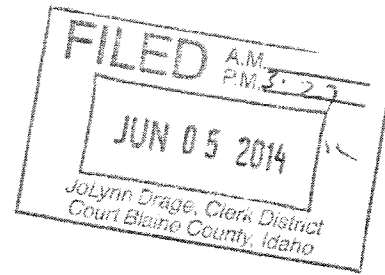
Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 3 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
☐ Express Mail  
☐ Hand Delivery  
☐ Facsimile- (208) 529-9732  
☒ E-mail

  
\_\_\_\_\_  
Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
WRIGHT BROTHERS LAW OFFICE, PLLC  
1166 Eastland Drive North, Suite A  
P.O. Box 226  
Twin Falls, ID 83303  
Telephone No. (208) 733-3107  
Facsimile No. (208) 733-1669  
e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )

Plaintiff/Counterdefendant, )

vs. )

SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )

Defendant/Counterclaimant. )

Case No. CV-2013-644

**AFFIDAVIT OF MARK  
JOHNSON IN SUPPORT OF  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

STATE OF IDAHO )  
 )ss.  
County of Blaine )

MARK JOHNSON, being first duly sworn upon oath, deposes and states:

1) My name is Mark Johnson. I am a member of Silver Creek Seed, LLC ("Silver Creek").

2) I have personal knowledge of the factual information contained herein, and am over the age of 18 years and competent to testify to the facts as stated herein.

3) This affidavit is made upon personal knowledge setting forth facts that I believe to be true and would be admissible in evidence.

66-1

4) I have worked as both an employee and owner in the seed potato business for approximately 27 years.

5) I formed Silver Creek in March 2006.

6) Prior to receiving the Sunrain Varieties, LLC ("Sunrain") potatoes involved in this litigation, Silver Creek never had any issues with bacterial ring rot.

7) Attached hereto as Exhibit A is a true and correct copy of the North American Certified Seed Potato Health Certificate – Crop Year 2010 for the 84180 lot at issue in this litigation.

8) Attached hereto as Exhibit B is a true and correct copy of the North American Certified Seed Potato Health Certificate – Crop Year 2011 for the 84180 lot at issue in this litigation.

9) In October, 2011, Sunrain shipped the 84180 lot of seed potatoes, identified according to Exhibit B as Nevada Lot No. 1131, from Nevada to Silver Creek in Idaho for storage.

10) Attached hereto as Exhibit C is a true and correct copy of the positive test for bacterial ring rot for Ebe Farms, LLC ("Ebe Farms"). Sunrain never told Silver Creek that the 84180 lot came from a farm that was infected with bacterial ring rot.

11) Attached hereto as Exhibit D is a true and correct copy of the *Blanket Variety Contract* (the "Contract") entered into between Silver Creek and Sunrain.

12) Pursuant to the Contract, Silver Creek cut and grew various varieties and generations of Sunrain seed potatoes, including 84180, Red Fantasy, Laura, Annabelle, Rumba, Allians, and Carrera (collectively, the "Potatoes") during the 2012 growing season. In the Fall of

2012, Silver Creek harvested the Potatoes and placed them in its cellars until Sunrain would pick them up prior to the 2013 growing season.

13) On or about March 29, 2013, the 84180 variety grown by Silver Creek tested positive for *Clavibacter michiganensis* subs. *Spedonicus* (referred to as "bacterial ring rot"). It is my understanding that Idaho Crop Improvement Association informed Sunrain of the positive test results before informing Silver Creek. Sunrain and Silver Creek discussed the above-described positive test result on or about March 29, 2013.

14) Attached hereto as Exhibit E is a true and correct copy of documentation received from Idaho Crop Improvement Association related to the positive test of the 84180 variety for bacterial ring rot.

15) On April 3, 2013, as a result of the positive test on the 84180 variety, Silver Creek sent 1,500 tuber samples of the 84180 variety; 2,200 tuber samples each of the Red Fantasy, Laura, Annabelle, Rumba, and Allians varieties; and 400 tuber samples of the Carrera variety to Agdia and North Dakota State University for PCR testing. The Red Fantasy, Laura, Annabelle, Allians, and Carrera varieties grown by Silver Creek all tested negative for bacterial ring rot (collectively, the "Non-Infected Potatoes") and were certifiable potatoes.

16) Attached hereto as Exhibit F is a copy of Silver Creek's summary of Agdia's testing of the tuber samples and the documentation received from Agdia.

17) Attached hereto as Exhibit G is a copy of Silver Creek's summary of the North Dakota State University testing of the tuber samples and the documentation received from North Dakota State University.

18) Attached hereto as Exhibit H is a true and correct copy of the Idaho Crop Improvement Association, Inc. Rules of Certification for Seed Potatoes in Idaho.

19) Prior to March 29, 2013 and the discovery of the bacterial ring rot, Sunrain sent trucks to Silver Creek's cellars and picked up some of the 84180 variety potatoes grown by Silver Creek, which Sunrain sold to a 3<sup>rd</sup> party potato farmer (collectively, the "1<sup>st</sup> Lot"). Sunrain kept all money received from the 3<sup>rd</sup> party potato farmer.

20) The 1<sup>st</sup> Lot passed the inspector's visual inspection test at the time.

21) After March 29, 2013 and the discovery of the bacterial ring rot, Sunrain sent trucks to Silver Creek's cellars and picked up some of the Potatoes, which Sunrain sold to a 3<sup>rd</sup> party as cattle feed (collectively, the "2<sup>nd</sup> Lot"). Sunrain also kept all money received from the 3<sup>rd</sup> party.

22) Despite taking the 1<sup>st</sup> Lot and the 2<sup>nd</sup> Lot and then selling them to third parties, Sunrain refuses to pay Silver Creek for those seed potatoes pursuant to the Contract.

23) At no time did Sunrain inform Silver Creek that it rejected or refused to accept the 1<sup>st</sup> Lot or 2<sup>nd</sup> Lot, or that it was revoking acceptance of the 1<sup>st</sup> Lot or 2<sup>nd</sup> Lot.

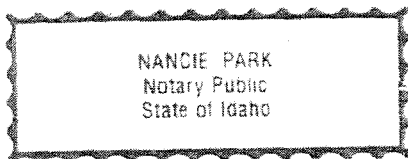
24) Despite the fact that the Non-Infected Potatoes were certifiable, Sunrain refuses to pay Silver Creek for these potatoes pursuant to the Contract.

Further your affiant sayeth naught.

DATED this 3 day of June, 2014.

By: Mark Johnson  
Mark Johnson

SUBSCRIBED and SWORN to before me this 3 day of June, 2014.



Nancie Park  
NOTARY PUBLIC FOR IDAHO  
Residing at Picabo, Id  
My Commission Expires: 7/22/10

CERTIFICATE OF SERVICE

3 Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
☐ Express Mail  
☐ Hand Delivery  
☐ Facsimile- (208) 529-9732  
☒ E-mail

Andrew B. Wright  
Andrew B. Wright

# EXHIBIT A



Grower		Importer	
Name	Ebe Farms	Potomac Produce	
City, State/Prov.	Ferndale, Washington		
Variety	A84180-8	Acres	3.5
Lot Certification		Quantity Shipped	
Certification #	10-04-32-G2	Size	Blue Tag
Seed Class/Gen.	G2	Lot origination from tissue culture	
Certifying State	Washington	No	<input type="checkbox"/> Yes <input checked="" type="checkbox"/>
by		Year micropropagated for planting	2007

2007	2007	2008	2009	2010	Year of Production
TC	PN				Greenhouse
	Ashton Hi-Tech Seed	GN	G1	G2	Field (note special measures below)
	704024	08-04-125-GN	09-04-43-G1	10-04-32-G2	Certification No.
CO	ID	WA	WA	WA	No. years produced
					Certifying State
					in field soil
					3

1st	2nd	3rd	Final
0%	0%	n/a	0%
0%	0%	n/a	0%
0%	0%	n/a	0%
		Less Than	0%
		Less Than	0%
		Less Than	0%

FINAL	Location	n/a
n/a	Sample No.	n/a
n/a	Plant Count	n/a
n/a		

%PVY	n/a	%PVX	n/a
------	-----	------	-----

Not known to occur in grower's area	if free > 10 years	certification field
	N.O.R.	
		x

Yes ☒ No ☐

66-7

## **EXHIBIT B**

**NORTH AMERICAN CERTIFIED SEED POTATO HEALTH CERTIFICATE - CROP YEAR 2011**

Name		Grower		Importer	
City, State/Prov.		SunRain Varieties LLC		Unknown	
		Wells, Nevada			
Variety		A84180-8	Acres	12.96	Quantity Shipped
					Not available
Lot Certification		Size			
Certification #		1131	Lot origination from tissue culture		No <input type="checkbox"/> Yes <input checked="" type="checkbox"/>
Seed class / Gen.		Certified G3	Year micropropagated for planting		2007
Certifying State / Prov.		Nevada	by:		

Production environment pedigree: Fill 1 column per production year; use different initials in Greenhouse and Field boxes for different farms (e.g. JSF for John Smith Farms); indicate a tuber-united lot with a "+" after farm initials; describe other footnotes in 'Notes' below.

2007	2007	2008	2009	2010	2011	Year of Production
TC	PN					Greenhouse (insect excluding) & sterile soil
	Ashton Hi-Tech Seed	GN	G1	G2	G3	Field (note special measures below)
	704G24	06-04-125- GN	09-04-43- G1	10-04- 32-G2	1131	Certification Number of years produced
						No.
CO	ID	WA	WA	WA	NV	Certifying Agency in field soil: 4

**Summer field readings**  
Field inspection

1st	2nd	3rd	FINAL
0.00	0.04	N/A	N/A
0.26	0.08	N/A	N/A
0.00	0.00	N/A	N/A
Less than		N/A	
Less than		N/A	

%LEAF ROLL  
%MOSAIC  
%VARIETAL MIXTURE  
%BLACKLEG  
%VERT + %FUSARIUM +  
N/A 0

**Post harvest test readings**

Location **Calistonia, California**

FINAL
0.00
0.24
0.00

Sample no. 4  
Plant count 410

**ELISA test results for latent viruses**

%PVY	0.24	%PVX	0.00
%PLRV	0.00		

**Other diseases**

Not known to occur in grower's area  
No. of years since last found on this grower's farm, or NONE ON RECORD if free >10 years

Not found this year during normal certification field inspections

Bacterial Ring Rot	X	X
Golden Nematode	X	X
Late Blight	X	X
Root-Knot Nematode	X	X
Potato Rot Nematode	X	X
Potato Wart	X	X
Powdery Scab	X	X
Potato Spindle Tuber Viroid	X	X
Corky Ring Spot	X	X

Eligible for recertification in the area of production Yes ☒ No ☐

**Notes:**

Certification applicable only if grade requirements specified in Nevada Administrative Code part 587.442 are satisfied.

The above information is accurate to the best of our knowledge

March 13, 2012

Date

Steve Marty, Agriculturist IV

775-355-3773

Program official / title

Telephone

Nevada Department of Agriculture

775-353-3638

Agency

FAX

Approved for use by the Certification Section of the Potato Association of America

Sunrain 000538

late-9

# EXHIBIT C

Sherry Laug, Manager  
Seed Certification Laboratory - Idaho Falls  
E-Mail: slaug@idahocrop.com

Karen Robbins, Lead Lab Technician  
Seed Certification Laboratory - Idaho Falls  
E-Mail: krobbins@idahocrop.com



Office - 1680 Front Drive  
Idaho Falls, ID 83402  
(208) 522-9198 Phone  
(208) 529-4358 Fax

LOOK FOR THE EMBLEM OF THE TAG

## IDAHO CROP IMPROVEMENT ASSOCIATION, INC.

Date: November 18, 2011  
To: Kay Oakley  
Washington State Department of Ag  
From: Sherry Laug *S. Laug*  
Seed Certification Laboratory  
Subject: Testing Results  
Reference no.: SCL #4042

We have completed testing for Bacterial Ring Rot on the two tubers that you submitted 11/18/2011. The samples were identified as Chieftain, Lot #11-04-05. These samples were tested by Express® agglutination, Gram stain, and IFAS. Both tubers tested **positive** for BRR. If you have any questions, please feel free to contact me at (208) 522-9198.

pc: file

MEMBER ASSOCIATION OF OFFICIAL SEED CERTIFYING AGENCIES  
COOPERATING WITH THE UNIVERSITY OF IDAHO  
COLLEGE OF AGRICULTURE

PROHIBITING PURE SEED, NINE EIGHT RULES AND REGULATIONS  
INCLUDING FIELD INSPECTION, STORAGE, HARVESTING,  
PROCESSING, MARKING AND SEALING

Sample ID No. \_\_\_\_\_ (PLEASE WRITE THIS NUMBER ON THE SAMPLE BAG)

Lab Number: \_\_\_\_\_ Subsamples A- \_\_\_\_\_ Date Received: \_\_\_\_\_

SAMPLE IDENTIFICATION: Official ☒ Unofficial ☐ Inspector: Kay Oakley - WSDA

Commodity: Seed Potato Lot Number: 11-04-05 Sample Date: 11-17-2011

Variety: Chieftain Origin: Whitcomb Co Weight: 2 bushels

Company: (Eber Farms) by WSDA Contact: Kay Oakley

Address: 1000 N Forest St City: Bellingham

State: WA Zip Code: 98225 Phone/Fax: 360-676-6939 KOakley@agr.wa.gov

Reason for sample: Bacterial Ring Rot confirmation  
(Bean serology (export, pest survey, service, etc.))

REQUESTED TESTS (Please mark box to the left of tests)						
	Alfalfa	POS	NEG		Corn	POS NEG
<input type="checkbox"/>	<i>Clavibacter michiganense</i> subsp. <i>insidiosum</i>			<input type="checkbox"/>	<i>Diplodia</i> spp. **	
<input type="checkbox"/>	<i>Xanthomonas campestris</i> pv. <i>alfalfae</i>			<input type="checkbox"/>	<i>Fusarium</i> spp.	
<input type="checkbox"/>	<i>Cercospora medicaginis</i>			<input type="checkbox"/>	<i>Helminthosporium maydis</i>	
<input type="checkbox"/>	<i>Phoma</i> spp.			<input type="checkbox"/>	High Plains virus (call for availability)	
<input type="checkbox"/>	<i>Verticillium albo-atrum</i>			<input type="checkbox"/>	Maize Dwarf Mosaic virus	
<input type="checkbox"/>	Alfalfa Mosaic virus**			<input type="checkbox"/>	Wheat Streak Mosaic virus	
	Bean				Pea	
<input type="checkbox"/>	<i>Curtobacter flaccumfaciens</i>			<input type="checkbox"/>	<i>Pseudomonas syringae</i> pv. <i>pisi</i>	
	subsp. <i>flaccumfaciens</i>			<input type="checkbox"/>	<i>Ascochyta</i> spp.	
<input type="checkbox"/>	<i>Pseudomonas syringae</i> <i>syringae</i>			<input type="checkbox"/>	<i>Fusarium oxysporum pisi</i>	
<input type="checkbox"/>	<i>P. savastanoi</i> pv. <i>phaseolicola</i>			<input type="checkbox"/>	<i>Phoma</i> spp.	
<input type="checkbox"/>	<i>Xanthomonas axonopodis</i> pv. <i>phaseoli</i>				Potato	
<input type="checkbox"/>	<i>X. axonopodis</i> pv. <i>phaseoli</i> var. <i>fuscans</i>			<input checked="" type="checkbox"/>	<i>Clavibacter michiganense</i> subsp. <i>sepedonicus</i>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<i>Colletotrichum lindemuthianum</i>			<input type="checkbox"/>	Potato virus Y	
<input type="checkbox"/>	<i>Fusarium</i> spp.			<input type="checkbox"/>	Potato Leaf Roll virus	
<input type="checkbox"/>	<i>Phaeoisariopsis griseola</i>				Tomato	
<input type="checkbox"/>	Bean Common Mosaic virus **			<input type="checkbox"/>	<i>X. campestris</i> pv. <i>vesicatorum</i>	
	Brassicas			<input type="checkbox"/>	<i>Fusarium</i> spp.	
<input type="checkbox"/>	<i>Escherichia coli</i> O157:H7				Wheat, Barley, Oats and Straw	
<input type="checkbox"/>	<i>Pseudomonas syringae</i> pv. <i>maculicola</i>			<input type="checkbox"/>	<i>Tilletia indica</i>	
<input type="checkbox"/>	<i>Salmonella</i> spp.			<input type="checkbox"/>	<i>Tilletia controversa</i>	
	Carrot			<input type="checkbox"/>	<i>Urocystis</i> spp.	
<input type="checkbox"/>	<i>Xanthomonas campestris</i> pv. <i>carotae</i>				Miscellaneous	
<input type="checkbox"/>	<i>Alternaria dauci</i>			<input type="checkbox"/>	<i>Phytophthora ramorum</i> **	
<input type="checkbox"/>	<i>Alternaria radicina</i>			<input type="checkbox"/>	Potyvirus screen **	
				<input type="checkbox"/>		
				<input type="checkbox"/>		

\*\*Test on field tissue only

Comments/requests:

Date Reported: 11/18/11 Analyst: S. Laug

IDAHO STATE DEPARTMENT OF AGRICULTURE\*  
PLANT PATHOLOGY LABORATORY ANALYSIS SUBMISSION AND REPORT FORM  
2230 Old Penitentiary Road, Boise, ID 83712 Phone: 208-332-8640 Fax: 208-332-8645

Kay Oakley

666-17



Washington State Department of Agriculture  
Plant Protection Division  
PO Box 42591  
Olympia, WA 98504-2591  
(360) 902-1922

Document Number: SP-98A

**APPLICATION FOR  
PLANT PROPAGATION AND CERTIFICATION**  
**WASHINGTON CERTIFIED SEED POTATO**  
(Attach North American Certified Seed Potato Health Certificate and fees)

FEES - 1<sup>st</sup> Half:

348.00

APPLICANT:	Ebe Farms LLC				
MAILING ADDRESS:	2212 Birch Bay Lynden Road				
	Custer, WA 98240				
Lot Number	Crop Year	Grower #	Field #	Class	
	11	04	05	G2	
I hereby apply for certification and agree to abide by all rules and Regulations governing the inspection and certification of seed potatoes.					
Authorized Agent: Greg Ebe		Date: 06/15/2011			

SEED SOURCE IDENTIFICATION NO.

2010-04-37A

VARIETY	CLASS PLANTED
Chieftain	G1

FIELD TYPE	SIZE	DATE PLANTED
Acre	24	05/19/2011

SEED SPACING AT PLANTING  
6.2

AVERAGE LENGTH OF ROWS  
1825.00

☒ CUT SEED ☐ SINGLE DROP

FIELD INSPECTION RECORD			
3532.26	1 <sup>st</sup> Field Reading	2 <sup>nd</sup> Field Reading	3 <sup>rd</sup> Field Reading
Inspection Sample	10597	10597	
Inspection Date	07/06/2011	08/16/2011	
Varietal Purity	good	OK	
Vigor and Uniformity	good	Good	
VIRUS DISEASES:			
Mosaic	1 = 0.01%	0	
Leafroll (Seedborne)	0	0	
Leafroll (Current)	0	0	
OTHER DISORDERS:			
Late Blight	0	0	
Wilts	0	0	
Blackleg	0	0	
Rhizoctonia	0	0	
Phytoplasmas	0	0	
Giant Hill	0	0	
INSECT POPULATION:			
Aphids	0	0	
Leafhoppers	0	0	
PASSED / (Yes or No)	Yes	Yes	
Rating	GEN 2		
Inspected by:	Kay Oakley	Gary Whitwer	
*POST HARVEST TEST REQUIRED FOR RECERTIFICATION			

**LAST CROPPED TO POTATOES**

YEAR	VARIETY	Lot No.
2007	Red Lasoda	

In the space provided below, draw a sketch showing directions from town, road names and location of field on farm in relation to buildings, landmarks and other crop.

N48.9303

W122.5854

W

E

S

## Straight Track Summary

Ebe2011 - Leonard - West



### Client Information:

Client: Ebe2011

Farm: Leonard

Field: West

### Legend Information:

No Information Available

### Field Information:

Track Spacing:

Heading: 0.2503 deg

Point A (Lat,Long) 48.930311,

-122.585454

Point B (Lat,Long) 48.93528,

-122.585421

Field information and legend apply to active map layer only.

*Birch Bay Lynden Road*

*Woodland Road*

West  
25.122 ac

1000 ft



66-14



## EXHIBIT D

# Sunrain Potato Varieties, L.L.C. Seed Potato Grower Contract

## *Blanket Variety Contract*

This agreement (hereinafter referred to as "Agreement") is made and entered into this 10th day of May, 2012 by and between Sunrain Potato Varieties, L.L.C. a Delaware Limited Liability Company, hereinafter referred to as "Sunrain", and Silver Creek Seed L.L.C. Seed Farms, an Idaho partnership, hereinafter referred to as "Silver Creek Seed L.L.C.".

Whereas, Sunrain wishes to secure a secure, clean source of certified potato seed of Proprietary varieties, for Sunrain's/ 2013 commercial planting seasons, AND

Whereas, Silver Creek Seed L.L.C. is in the business to supply certified potato seed;

Now, Therefore, in consideration of the covenants and conditions contained herein, Sunrain and Silver Creek Seed L.L.C. do agree to the following:

- 1) **TERM:** The Term of this agreement shall be for Silver Creek Seed L.L.C.'s seed crop grown in 2012, in or around Blaine County for delivery to commercial growers in December 2012, culminating in last deliveries in May 2013. This contract will be renewable for 2013-2014, upon renegotiation of seed quality and yield in the event of a pricing change. In addition this will be a rolling, 3 Year contract depending on annual evaluation of the program, varieties, and pricing structure. Parties will endeavor to meet pricing laid forward based on costing of early generation seed lots incoming to Silver Creek Seed. There will be two down payments on the seed for delivery in commercial years beginning in the fall of 2012. The dates will be December 31, March 1 for \$2.00/cwt for December payment and \$3.00 for the March payment. The final payment is due 30 days after shipping, and Silver Creek will invoice Sunrain for both down payments, and invoices regarding shipments. In addition, Sunrain will rent 1 storage facility beginning in 2012 Fall. The pricing will be .55 cents per cwt and the payments will be 1/3, 1/3, and 1/3. The payment schedule on the storage will be Oct 1, Feb, 1, and final payment 30 days after storage is empty. Silver Creek will take care of power, and oversee management of the storage, reporting to Sunrain any issues it deems necessary for proper seed storage. In addition, the building will carry insurance to ensure both parties that the product is covered by necessary insurance for the contents.

- 2) **PRICE and QUANTITY:** For the seed years 2012, 2013-commercial year 2012-2013, Silver Creek Seed L.L.C. agrees to sell Generation 3 Proprietary seed potatoes and Sunrain agrees to purchase all cwt Generation 3 seed potatoes. Silver Creek Seed L.L.C. also will not be able to sell these varieties to any other entity other than Sunrain due to Sunrain's exclusive ownership of the varieties. Generation 3 seed will be sold to Sunrain at \$ 13.50 per cwt. In the event that the yield falls below 350 cwt the price will go to \$14.50/cwt. All prices are loaded bulk

delivery aboard Sunrain's trucks F.O.B. Silver Creek Seed L.L.C.'s storages. Silver Creek Seed L.L.C. shall cooperate with Sunrain's delivery schedules. All acreage will be GPS monitored and volume to back up yield calculations will be done by scaled out weights. Any Generation 2 seed sold to Sunrain will be priced at \$25.00 dollars/cwt and this price is based on 2012 incoming seed prices. Future pricing will depend on incoming early generation pricing on the Generation 2 seed.

3) **SIZE:** Size of seed shall be 1-1/2 oz. Minimum and 9.5 oz. Maximum, with a 5% tolerance on both size limits. Seed over the maximum size or under the minimum will be appraised to packing quality by Sunrain at harvest time and be considered to be packed at Potandon's fresh packing operation at Idaho Select or Walters's Produce, at either location in Idaho. The price will be \$6/cwt of bulk product. In no event shall seed potatoes exceed 5% on either minimum or maximum size be accepted. Sunrain reserves the right to refuse/reject any loads exceeding 5% on either minimum or maximum sizes.

4) **SEED QUALITY STANDARDS:** The seed shall conform to Idaho Crop Improvement Association standards for the generation being delivered to Sunrain, and must meet all certification requirements of the State of Idaho. All seed potatoes grown pursuant to this Agreement shall be inspected in the fields and storages by the appropriate inspectors. All seed potatoes shall be free from frost damage. Each load will be inspected, tagged, sealed, and certified prior to departure from Silver Creek Seed L.L.C.'s storages by the appropriate state inspection service. Each load will have an inspection certificate upon departure for Sunrain's destination. No advance payments shall be due with the exception of a down payment due 30 days after harvest. Silver Creek Seed L.L.C. will provide Sunrain with proof of said potatoes passing all certifications, and field inspections, due at the time of delivery or after final inspections. In addition, Silver Creek Seed L.L.C. agrees to follow Sunrain/Potandon/Solanum Seed Grower protocol "Attachment A". Also for all seed lots every attempt will be taken to allow seed to pass all state certification requirements as well as Phytosanitary requirements necessary for shipping into Canada. This will include PCN testing to USDA/CFIA guidelines and Columbia Basin Root Knot and Potato Rot Nematode testing. In addition 400 tuber samples will be sent to a USDA approved testing facility for Bacterial Ring Rot. Silver Creek Seed L.L.C. will attempt to make its seed potatoes make US Fresh Grade in the growing of the seed crops.

5) **SEED EXCLUSIVITY:** Silver Creek Seed L.L.C. understands that all varieties supplied by Sunrain are exclusive to Sunrain and cannot be sold in any method to other potato producers without Sunrain's written consent. In addition, Silver Creek Seed L.L.C. agrees to Solanum's Grower Agreement concerning the exclusivity of the varieties. (See Attachment "B")

6) **PAYMENT:** Upon proof of seed quality standards, full payment shall be made 30 days after delivery of said variety.

7) **ATTORNEY FEES-VENUE; APPLICABLE LAW:** Should any litigation be commenced between the parties concerning this Agreement or the rights and duties of the parties

in relation thereto, the action shall be brought exclusively in Bonneville County, Idaho and the prevailing party shall be entitled to recover actual attorney fees and costs incurred in such litigation. It is further agreed that either party may seek immediate injunctive relief for the performance of any term or condition of this Agreement. This Agreement shall be governed in accordance with the laws of the state of Idaho.

8) **ASSIGNMENT-SUCCESSORS:** This Agreement shall not be subcontracted, transferred, assigned or otherwise succeeded to, nor shall the performance of any of the duties set forth above be delegable by either party, without prior written consent of the other party. In the event of an assignment by consent, this Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of both parties. This Agreement shall not be assignable by operation of law.

9) **WAIVER OF BREACH:** The failure of either party to insist upon strict performance of any of the covenants and agreements contained herein shall not be construed to be a waiver or relinquishment of any such options or rights or of any other covenants or agreements, but the same shall be and remain in full force and effect.

10) **FORCE MAJEURE:** Silver Creek Seed L.L.C. and/or Sunrain's obligations under this Agreement shall be abated in the event or by virtue of acts of God, war, civil unrest, or other similar cause or event which materially affects the applicable party's ability to perform.

11) **NOTICES:** Any notice required to be given by any party to the other shall be deposited in the United States mail, registered or certified mail, return receipt requested, postage prepaid, addressed to Silver Creek Seed L.L.C. Seed Farms, PO Box 646 Picabo, Idaho 83348, or to Sunrain Potato Varieties, L.L.C., Attention Mel Davenport, 1210 Pier View Drive, Idaho Falls, Idaho 83404.

12) **CONFIDENTIALITY:** Both parties mutually agree not to disclose any of the terms of this Agreement to any third party as long as the Agreement remains in effect, provided that Silver Creek Seed L.L.C. may disclose terms for the sole purpose of obtaining financing so long as the financial institution(s) agree(s) to the terms of this confidentiality clause.

13) **WARRANTY AND LIMITATIONS OF LIABILITY:** Silver Creek Seed L.L.C. warrants that the potatoes sold hereunder, (i) shall be conveyed free and clear of all liens, encumbrances, (ii) are of merchantable quality as set forth herein, (iii) are fit for their intended use, and (iv) conform to the description and meets or exceeds the quality standards contained herein above. Silver Creek Seed L.L.C. shall indemnify and hold Sunrain harmless from all crop liens, security interests, debts, obligations and encumbrances and all costs and damages arising therefrom, including reasonable attorneys' fees and costs. As an additional remedy, Sunrain may include as additional payees on any payment checks payable to Silver Creek Seed L.L.C.; (a) anyone claiming any interest in the seed or proceeds purchased under this contract; (b) as of the time of each payment which may be due hereunder, any other person or company which notifies Sunrain, or records or files its notice of its claim of interest in the seed or proceeds therefrom.

Sunrain shall have no obligation to verify or consider the validity of such claims or notifications, and may include any claimant's name on such checks regardless of the validity of the claim. Silver Creek Seed L.L.C. makes no other warranties, express or implied, not otherwise contained herein. Consequential and incidental damages are hereby expressly excluded.

14) **ENTIRE AGREEMENT:** This instrument contains the entire Agreement between the parties and supersedes any prior agreement, written or oral, between them and shall not be modified except by an agreement in writing executed by all parties. This Agreement shall be amended only by written instruction signed by all parties. Headings of this Agreement are for convenience only and are not part of the Agreement and do not in any way limit or amplify the terms or provisions of the Agreement.

15) **WARRANTIES AND REPRESENTATIONS:** Each party warrants and represents to the other that it has the legal authority to enter into, execute and perform this Agreement, which each party is duly organized and in good standing under applicable law, and that the execution or performance of this Agreement shall not violate or breach any third party agreement or other obligation.

*Sunrain Potato Varieties, L.L.C.*

By:

Its:

Date:

*C. Jeffery B...*  
VP Sales/OPS  
5/10/2012

*Silver Creek Seed L.L.C.*

By:

Its:

Date:

*Mark Johnson*  
President  
5-10-2012

By:

Its:

Date:

*[Signature]*  
Business Manager  
5-10-2012

By:

Its:

Date:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

# EXHIBIT E



March 29, 2013

Silver Creek Seed LLC  
Mark Johnson  
PO Box 646  
Picabo, ID 83348

**Central Office**

429 SW 5th Avenue, Suite 105  
Meridian, ID 83642  
P: 208 884.8225  
F: 208 884.4201  
www.idahocrop.com

**District Offices**

2283 Wright Avenue, Suite C  
Twin Falls, ID 83303-4803  
P: 208 733.2468  
F: 208 733.4803

1680 Foote Drive  
Idaho Falls, ID 83402-1826  
P: 208 522.9198  
F: 208 529.4858

5920 Government Way, Suite 10  
Dalton Gardens, ID 83815.9200  
P: 208 762.5300  
F: 208 762.5335

Dear Mr. Johnson:

During the course of laboratory testing your lot (83120026, A84180-8), for the purpose of compliance with export phytosanitary requirements, *Clavibacter michiganensis* subsp. *sepedonicus*, the bacteria which causes bacterial ring rot, was detected. ELISA testing, IFA staining and PCR testing (using CefA primers, Mills primers and melt curve analysis) were utilized in making this determination.

According to the Idaho Rules of Certification for Seed Potatoes, Paragraph VI. Section J. "Seed Lot Disqualifying Conditions":

2. Bacterial Ring Rot, Corky Ring Spot and Root-Knot Nematode are zero tolerance factors. Any seed lot, regardless of generation, is automatically disqualified from certification when any of these factors is found at any time.
4. When Bacterial Ring Rot is found in a seed lot, all potatoes grown by that farming operation from that seed source shall be disqualified even if grown in different fields or on different seed farms.

Also, Paragraph III. "Seed Stock Eligibility Requirements" Section E. states that "All seed lots on a seed farm, except Nuclear class, are not eligible for recertification if any lot of seed on that farm was disqualified for certification because of Bacterial Ring Rot. Nuclear class seed may be recertified by the original applicant(s) only, if laboratory testing of that seed for Bacterial Ring Rot shows a negative result."

Therefore, seed lots (83120026, A84180-8) and (83120025, A84180-8) are disqualified from certification due to bacterial ring rot and all other G1 and later generation seed lots on the farm are ineligible for recertification.

Sincerely,

Doug Boze  
Executive Vice President

Cc: ISDA, FF&V

Member, Association of Official  
Seed Certifying Agencies  
cooperating with University of  
Idaho College of Agricultural  
and Life Sciences

Producing pure seed under  
rigid rules and regulation  
including field inspection,  
supervision of harvesting,  
conditioning, tagging  
and sealing

66-2

BRR Lot Testing 2013

2012 Crop

Lot #	Variety	Sample #	Date Shipped	Lab	Core #			
83120025	84180	234	4/3/2013	Idaho Crop	1500	pos		

606-2



Sherry Laug- Manager  
Seed Certification Laboratory - Idaho Falls  
E-Mail: slaug@idahocrop.com

Karen Robbins - Lead Lab Technician  
Seed Certification Laboratory - Idaho Falls  
E-Mail: krobbins@idahocrop.com

Office - 1680 Foote Drive  
Idaho Falls, ID 83402  
(208) 522-9198 Phone  
(208) 529-4358 Fax



LOOK FOR THIS EMBLEM ON THE TAG

IDAHO CROP IMPROVEMENT ASSOCIATION, INC.

Date: April 5, 2013  
To: Mark Johnson  
Silver Creek Seed  
From: Sherry Laug *S. Laug*  
Seed Certification Laboratory  
Subject: Test Results

Reference no.:

We have completed testing on the bulk sample submitted by Dr. Phil Nolte on April 3, 2013, for Bacterial Ring Rot Testing. The sample, which was identified as "234," consisted of 1500 cores which were divided into 12 subsamples. These were tested for BRR using both PCR and ELISA. Both tests indicated that the sample was positive for Bacterial Ring Rot. If you have any questions, please contact me at 208-522-9198.

pc: file

MEMBER ASSOCIATION OF OFFICIAL SEED CERTIFYING AGENCIES  
COOPERATING WITH THE UNIVERSITY OF IDAHO  
COLLEGE OF AGRICULTURE

PRODUCING PURE SEED UNDER RIGID RULES AND REGULATIONS  
INCLUDING FIELD INSPECTION, SUPERVISION OF HARVESTING,  
PROCESSING, TAGGING AND SEALING

PLEASE DO NOT PAY  
FROM THIS INVOICE

SCL NO. 4222

IDAHO CROP IMPROVEMENT ASSOCIATION, INC.

1680 Foote Drive, Idaho Falls, ID 83402

(208) 522-9198 \* E-mail slaug@idahocrop.com or krobbins@idahocrop.com

SEED CERTIFICATION LABORATORY TESTING SERVICE

NAME Mark Johnson PHONE \_\_\_\_\_  
COMPANY Silver Creek Seed FAX \_\_\_\_\_  
ADDRESS PO Box 646  
CITY Picabo STATE ID ZIP 83348  
EMAIL \_\_\_\_\_

Sample Information:

Testing Requested:

Leaves \_\_\_\_\_ Microtubers \_\_\_\_\_ Virus ELISA.. PLRV \_\_\_\_\_ PVY \_\_\_\_\_ PVX \_\_\_\_\_ PVS \_\_\_\_\_ PVYn \_\_\_\_\_  
Tubers \_\_\_\_\_ Seeds \_\_\_\_\_ PVA \_\_\_\_\_ PVM \_\_\_\_\_ PMTV \_\_\_\_\_ BCMV \_\_\_\_\_  
Plantlets \_\_\_\_\_ BRR.... ELISA \_\_\_\_\_ Express \_\_\_\_\_ GS \_\_\_\_\_  
Other \_\_\_\_\_ IFAS \_\_\_\_\_ Bulk ☒ - PCR  
Total Number of Samples 1500 Erwinia.... CVP \_\_\_\_\_ Stewart-MacConkey \_\_\_\_\_  
Date Received 4/3/13 Species ID \_\_\_\_\_  
Other.... \_\_\_\_\_

VIRUSES

# Viruses	# Samples	Price/Leaf Sample	Price/Tuber Sample	PMTV/Other	Total
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
TOTAL					_____

BACTERIAL RING ROT

Test	# Samples	Price/sample	Total
ELISA	_____	\$4.45	_____
Gram Stain	_____	\$8.05	_____
IFAS	_____	\$25.35	_____
Express	_____	\$6.55	_____
Bulk BRR	_____	\$167.00	_____
Bulk Pcl	<u>8</u>	<u>50.00</u>	<u>400<sup>00</sup></u>
TOTAL			_____

ERWINIA

Test	# Samples	Price/Sample	Total
CVP	_____	\$7.25	_____
MacConkey	_____	\$7.25	_____
Species ID	_____	\$48.75	_____
Other	_____	_____	_____
_____	_____	_____	_____
TOTAL			_____

TOTAL COST

Viruses .....	_____
Bacterial Ring Rot .....	_____
Erwinia .....	_____
Other <u>Bulk BRR - PCR</u> .....	<u>400<sup>00</sup></u>
Subtotal .....	_____
Less Discount .....	_____
TOTAL .....	<u>400<sup>00</sup></u>

DO NOT PAY FROM THIS INVOICE

You will be billed by our Twin Falls/Meridian offices for this fee.

234-Nolte

66-24

# EXHIBIT F

## BRR Lot Testing 2013

## 2012 Crop

Lot #	Variety	Sample #	Date Shipped	Lab	Core #				
83120025	84180	234	4/3/2013	Agdia	1500	neg			
83120027	Allian G-3	237	4/3/2013	Agdia	2200	neg			
83120029	Rumba G-3	238	4/3/2013	Agdia	2200	neg			
83120018	Laura G-3	239	4/4/2013	Agdia	2200	neg			
83120016	Laura G-2	240	4/9/2013	Agdia	2200	neg			
83120030	Annabelle G-3	242	4/4/2013	Agdia	2200	neg			
83120019	Annabelle G-3	243	4/9/2013	Agdia	2200	neg			
83120017	Annabelle G-2	244	4/9/2013	Agdia	2200	neg			
83120020	Red Fantasy G-2	246	4/9/2013	Agdia	2200	neg			
83120027	Granola G-2	233	4/9/2013	Agdia	4400	neg	Official Sample-	Tom from Dept. of Ag supervising	
83120028	Carrera G-2	247	4/10/2013	Agdia	400	neg			

07-07-10

Webmail

Print

subject: FW: Activity 2013040502, 2 potato-tuber lots  
from: Mark Johnson<[markj@hughes.net](mailto:markj@hughes.net)>  
date: Mon, Apr 15 2013 at 8:23 AM  
to: [nanciescs@hughes.net](mailto:nanciescs@hughes.net)

From: Elizabeth Kmiecik [<mailto:elizabeth@agdia.com>]  
Sent: Friday, April 12, 2013 3:42 PM  
To: [markj@hughes.net](mailto:markj@hughes.net)  
Subject: Activity 2013040502, 2 potato tuber lots

Dear Mark:

Attached is the final report for Activity 2013040502, 2 potato tuber lots.

All twenty-two Potato tuber core subsamples of lots '239' and '242' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

If you have any questions or need additional information, please call at 1-800-622-4342, fax at 574-264-2153, or e-mail me at [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)

Regards,  
Elizabeth

Elizabeth Kmiecik  
ELISA Laboratory Supervisor  
Testing Services  
Agdia Inc.  
30380 County Road 6  
Elkhart, IN 46514

Telephone: (574) 264-2014  
Fax: (574) 264-2153  
E-mail: [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)

66-27



Agdia Incorporated • 30380 County Road 6 • Elkhart, Indiana 46514 USA  
1-800-622-4342 • 574-264-2014 • FAX 574-264-2153 • <http://www.agdia.com>

12-Apr-13

Mr. Mark Johnson  
Johnson, Mark  
P.O. Box 646  
Picabo, ID 83348  
USA

AGDIA TESTING SERVICES REPORT

Sample(s) received: 05-Apr-13

Activity: 2013040502  
ReportNum: 1

Twenty-two samples were tested for the presence of the following:

Clavibacter michiganensis sepedonicus PCR	Cms sp (PCR)
-------------------------------------------	--------------

All twenty-two Potato tuber core subsamples of lots '239' and '242' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

The following table contains specific data on the tests conducted and their results.

Thank you for using Agdia Testing Services. Please call us at 1-800-62-AGDIA if you have any questions.

Sincerely,

*Samantha R Juszcak*

Samantha R Juszcak  
Testing Service  
[samantha@agdia.com](mailto:samantha@agdia.com)

666-28

## Testing Report

Activity: 2013040502 ReportNum: 1

Page 1

SampleNum	Sample Type	Lot ID	Subsample	Cms sp (PCR)
1	Potato tuber cores	239	1	Negative
2	Potato tuber cores	239	2	Negative
3	Potato tuber cores	239	3	Negative
4	Potato tuber cores	239	4	Negative
5	Potato tuber cores	239	5	Negative
6	Potato tuber cores	239	6	Negative
7	Potato tuber cores	239	7	Negative
8	Potato tuber cores	239	8	Negative
9	Potato tuber cores	239	9	Negative
10	Potato tuber cores	239	10	Negative
11	Potato tuber cores	239	11	Negative
12	Potato tuber cores	242	1	Negative
13	Potato tuber cores	242	2	Negative
14	Potato tuber cores	242	3	Negative
15	Potato tuber cores	242	4	Negative
16	Potato tuber cores	242	5	Negative
17	Potato tuber cores	242	6	Negative
18	Potato tuber cores	242	7	Negative
19	Potato tuber cores	242	8	Negative
20	Potato tuber cores	242	9	Negative
21	Potato tuber cores	242	10	Negative
22	Potato tuber cores	242	11	Negative
Pos Ctl				Positive

66-29

Wednesday

Print

subject: FW: Activity 2013041006, 5 potato tuber lots  
from: Mark Johnson<markj@hughes.net>  
date: Mon, Apr 15 2013 at 8:23 AM  
to: nanciescs@hughes.net

From: Elizabeth Kmiecik [<mailto:elizabeth@agdia.com>]  
Sent: Friday, April 12, 2013 3:42 PM  
To: [markj@hughes.net](mailto:markj@hughes.net)  
Subject: Activity 2013041006, 5 potato tuber lots

Dear Harini:

Attached is the final report for Activity 2013041006, 5 potato tuber lots.

All sixty-six Potato tuber core subsamples of lots '233', '240', '243', '244', and '246' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

If you have any questions or need additional information, please call at 1-800-622-4342, fax at 574-264-2153, or e-mail me at [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)

Regards,  
Elizabeth

Elizabeth Kmiecik  
ELISA Laboratory Supervisor  
Testing Services  
Agdia Inc.  
30380 County Road 6  
Elkhart, IN 46514

Telephone: (574) 264-2014  
Fax: (574) 264-2153  
E-mail: [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)





Agdia Incorporated • 30380 County Road 6 • Elkhart, Indiana 46514 USA  
1-800-622-4342 • 574-264-2014 • FAX 574-264-2153 • <http://www.agdia.com>

12-Apr-13

Mr. Mark Johnson  
Johnson, Mark  
P.O. Box 646  
Picabo, ID 83348  
USA

AGDIA TESTING SERVICES REPORT

Sample(s) received: 10-Apr-13

Activity: 2013041006  
ReportNum: 1

Sixty-six samples were tested for the presence of the following:

Clavibacter michiganensis sepedonicus PCR	Cms sc (PCR)
-------------------------------------------	--------------

All sixty-six Potato tuber core subsamples of lots '233', '240', '243', '244', and '246' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

The following table contains specific data on the tests conducted and their results.

Thank you for using Agdia Testing Services. Please call us at 1-800-62-AGDIA if you have any questions.

Sincerely,

*Samantha R Juszcak*

Samantha R Juszcak  
Testing Service  
[samantha@agdia.com](mailto:samantha@agdia.com)

# Testing Report

Activity: 2013041006 ReportNum: 1

Page 1

SampleNum	Sample Type	Sample ID	Sample #	Cms sp (PCR)
1	Potato tuber cores	244	1	Negative
2	Potato tuber cores	244	2	Negative
3	Potato tuber cores	244	3	Negative
4	Potato tuber cores	244	4	Negative
5	Potato tuber cores	244	5	Negative
6	Potato tuber cores	244	6	Negative
7	Potato tuber cores	244	7	Negative
8	Potato tuber cores	244	8	Negative
9	Potato tuber cores	244	9	Negative
10	Potato tuber cores	244	10	Negative
11	Potato tuber cores	244	11	Negative
12	Potato tuber cores	246	1	Negative
13	Potato tuber cores	246	2	Negative
14	Potato tuber cores	246	3	Negative
15	Potato tuber cores	246	4	Negative
16	Potato tuber cores	246	5	Negative
17	Potato tuber cores	246	6	Negative
18	Potato tuber cores	246	7	Negative
19	Potato tuber cores	246	8	Negative
20	Potato tuber cores	246	9	Negative
21	Potato tuber cores	246	10	Negative
22	Potato tuber cores	246	11	Negative
23	Potato tuber cores	243	1	Negative
24	Potato tuber cores	243	2	Negative
25	Potato tuber cores	243	3	Negative
26	Potato tuber cores	243	4	Negative
27	Potato tuber cores	243	5	Negative
28	Potato tuber cores	243	6	Negative
29	Potato tuber cores	243	7	Negative
30	Potato tuber cores	243	8	Negative
31	Potato tuber cores	243	9	Negative
32	Potato tuber cores	243	10	Negative
33	Potato tuber cores	243	11	Negative
34	Potato tuber cores	240	1	Negative
35	Potato tuber cores	240	2	Negative
36	Potato tuber cores	240	3	Negative
37	Potato tuber cores	240	4	Negative
38	Potato tuber cores	240	5	Negative
39	Potato tuber cores	240	6	Negative
40	Potato tuber cores	240	7	Negative
41	Potato tuber cores	240	8	Negative
42	Potato tuber cores	240	9	Negative
43	Potato tuber cores	240	10	Negative
44	Potato tuber cores	233	1	Negative
45	Potato tuber cores	233	2	Negative
46	Potato tuber cores	233	3	Negative
47	Potato tuber cores	233	4	Negative
48	Potato tuber cores	233	5	Negative
49	Potato tuber cores	233	6	Negative
50	Potato tuber cores	233	7	Negative
51	Potato tuber cores	233	8	Negative
52	Potato tuber cores	233	9	Negative

66-32

# Testing Report

Activity: 2013041006 ... ReportNum: 1

Page 2

SampleNum	Sample Type	Sample ID	Sample #	Cons sp (PCR)
53	Potato tuber cores	233	10	Negative
54	Potato tuber cores	233	11	Negative
55	Potato tuber cores	233	12	Negative
56	Potato tuber cores	233	13	Negative
57	Potato tuber cores	233	14	Negative
58	Potato tuber cores	233	15	Negative
59	Potato tuber cores	233	16	Negative
60	Potato tuber cores	233	17	Negative
61	Potato tuber cores	233	18	Negative
62	Potato tuber cores	233	19	Negative
63	Potato tuber cores	233	20	Negative
64	Potato tuber cores	233	21	Negative
65	Potato tuber cores	233	22	Negative
66	Potato tuber cores	240	11	Negative
Pos Ctl				Positive

66-33

Webmail

Print

subject: FW: Activity 2013041104, 1 potato tuber lot  
from: Mark Johnson<markj@hughes.net>  
date: Mon, Apr 15 2013 at 8:23 AM  
to: nanciescs@hughes.net

From: Elizabeth Kmiecik [<mailto:elizabeth@agdia.com>]  
Sent: Friday, April 12, 2013 3:42 PM  
To: [markj@hughes.net](mailto:markj@hughes.net)  
Subject: Activity 2013041104, 1 potato tuber lot

Dear Mark:

Attached is the final report for Activity 2013041104, 1 potato tuber lot.

The two Potato tuber core subsamples of lot '247' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

If you have any questions or need additional information, please call at 1-800-622-4342, fax at 574-264-2153, or e-mail me at [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)

Regards,  
Elizabeth

Elizabeth Kmiecik  
ELISA Laboratory Supervisor  
Testing Services  
Agdia Inc.  
30380 County Road 6  
Elkhart, IN 46514

Telephone: (574) 264-2014  
Fax: (574) 264-2153  
E-mail: [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)

666-34



Agdia Incorporated • 30380 County Road 6 • Elkhart, Indiana 46514 USA  
1-800-622-4342 • 574-264-2014 • FAX 574-264-2153 • <http://www.agdia.com>

12-Apr-13

Mr. Mark Johnson  
Johnson, Mark  
P.O. Box 646  
Picabo, ID 83348  
USA

AGDIA TESTING SERVICES REPORT

Sample(s) received: 11-Apr-13

Activity: 2013041104  
ReportNum: 1

Two samples were tested for the presence of the following:

Clavibacter michiganensis sepedonicus PCR	Cms sp (PCR)
-------------------------------------------	--------------

The two Potato tuber core subsamples of lot '247' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

The following table contains specific data on the tests conducted and their results.

Thank you for using Agdia Testing Services. Please call us at 1-800-62-AGDIA if you have any questions.

Sincerely,

*Samantha R Juszcak*

Samantha R Juszcak  
Testing Service  
[samantha@agdia.com](mailto:samantha@agdia.com)

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# Testing Report

Activity: 2013044104 ReportNum: 1

Page 1

SampleNum	Sample Type	Sample ID	Sample #	Cms sp (PCR)
1	Potato tuber cores	247	1	Negative
2	Potato tuber cores	247	2	Negative
Pos Ctl				Positive

66-36

Webmail

Print

subject: FW: Activity 2013040418, 3 potato seed lots  
from: Mark Johnson<markj@hughes.net>  
date: Mon, Apr 15 2013 at 9:30 AM  
to: nanciescs@hughes.net

From: Elizabeth Kmiecik [<mailto:elizabeth@agdia.com>]  
Sent: Friday, April 12, 2013 3:42 PM  
To: [markj@hughes.net](mailto:markj@hughes.net)  
Subject: Activity 2013040418, 3 potato seed lots

Dear Mark:

Attached is the final report for Activity 2013040418, 3 potato seed lots.

All thirty Potato tuber core subsamples of lots '234', '237', and '238' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

If you have any questions or need additional information, please call at 1-800-622-4342, fax at 574-264-2153, or e-mail me at [Elizabeth@agdia.com](mailto:Elizabeth@agdia.com)

Regards,  
Elizabeth

Elizabeth Kmiecik  
ELISA Laboratory Supervisor  
Testing Services  
Agdia Inc.  
30380 County Road 6  
Elkhart, IN 46514

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Fax: (574) 264-2153  
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66-37



Agdia Incorporated • 30380 County Road 6 • Elkhart, Indiana 46514 USA  
1-800-622-4342 • 574-264-2014 • FAX 574-264-2153 • <http://www.agdia.com>

12-Apr-13

Mr. Mark Johnson  
Johnson, Mark  
P.O. Box 646  
Picabo, ID 83346  
USA

AGDIA TESTING SERVICES REPORT

Sample(s) received: 04-Apr-13

Activity: 2013040418  
ReportNum: 1

Thirty samples were tested for the presence of the following:

Clavibacter michiganensis sevedonicus PCR	Cms sp (PCR)
-------------------------------------------	--------------

All thirty Potato tuber core subsamples of lots '234', '237', and '238' tested negative for the presence of CMS according to the CMS Specific Real-Time PCR test.

The following table contains specific data on the tests conducted and their results.

Thank you for using Agdia Testing Services. Please call us at 1-800-62-AGDIA if you have any questions.

Sincerely,

*Samantha R Juszczyk*

Samantha R Juszczyk  
Testing Service  
[samantha@agdia.com](mailto:samantha@agdia.com)



# Testing Report

Activity: 2013040418 ReportNum: 1

Page 1

SampleNum	Sample Type	Sample ID	Subsample	Result (PCR)
1	Potato tuber core	237	1	Negative
2	Potato tuber core	237	2	Negative
3	Potato tuber core	237	3	Negative
4	Potato tuber core	237	4	Negative
5	Potato tuber core	237	5	Negative
6	Potato tuber core	237	6	Negative
7	Potato tuber core	237	7	Negative
8	Potato tuber core	237	8	Negative
9	Potato tuber core	237	9	Negative
10	Potato tuber core	237	10	Negative
11	Potato tuber core	237	11	Negative
12	Potato tuber core	234	1	Negative
13	Potato tuber core	234	2	Negative
14	Potato tuber core	234	3	Negative
15	Potato tuber core	234	4	Negative
16	Potato tuber core	234	5	Negative
17	Potato tuber core	234	6	Negative
18	Potato tuber core	234	7	Negative
19	Potato tuber core	234	8	Negative
20	Potato tuber core	238	1	Negative
21	Potato tuber core	238	2	Negative
22	Potato tuber core	238	3	Negative
23	Potato tuber core	238	4	Negative
24	Potato tuber core	238	5	Negative
25	Potato tuber core	238	6	Negative
26	Potato tuber core	238	7	Negative
27	Potato tuber core	238	8	Negative
28	Potato tuber core	238	9	Negative
29	Potato tuber core	238	10	Negative
30	Potato tuber core	238	11	Negative
Pos Ctl				Positive

## EXHIBIT G

Lot #	Variety	Sample #	Date Shipped	Lab	
83120025	84180	234	4/3/2013	Agdia	neg
83120025	84180	234	4/3/2013	NDSU	pos
83120025	84180	234	4/3/2013	Idaho Crop	pos
83120032	Granola G1	235	4/3/2013	NDSU	neg
83120031	Granola G2	236	4/3/2013	NDSU	neg
- 83120027	Allian G-3	237	4/3/2013	NDSU	neg
- 83120027	Allian G-3	237	4/3/2013	Agdia	neg
- 83120029	Rumba G-3	238	4/3/2013	NDSU	pos
- 83120029	Rumba G-3	238	4/3/2013	Agdia	neg
- 83120018	Laura G-3	239	4/4/2013	NDSU	neg
- 83120018	Laura G-3	239	4/4/2013	Agdia	neg
- 83120016	Laura G-2	240	4/9/2013	Agdia	neg
- 83120016	Laura G-2	240	4/9/2013	NDSU	neg
83120030	Annabelle G-3	242	4/4/2013	NDSU	neg
83120030	Annabelle G-3	242	4/4/2013	Agdia	neg
- 83120019	Annabelle G-3	243	4/9/2013	Agdia	neg
- 83120019	Annabelle G-3	243	4/9/2013	NDSU	neg
83120017	Annabelle G-2	244	4/9/2013	Agdia	neg
83120017	Annabelle G-2	244	4/9/2013	NDSU	neg
- 83120020	Red Fantasy G-2	246	4/9/2013	Agdia	neg
- 83120020	Red Fantasy G-2	246	4/9/2013	NDSU	neg
83120027	Granola G-2	233	4/9/2013	Agdia	neg
83120028	Carrera G-2	247	4/10/2013	Agdia	neg
83120010	Russet Burbank G-3		1/30/2013	NDSU	neg
83120012	Russet Burbank G-2		1/30/2013	NDSU	neg
83120013	Russet Burbank G-3		1/30/2013	NDSU	neg
83120014	Rangers G-3		1/29/2013	NDSU	neg
83120015	Rangers G-3		1/29/2013	NDSU	neg
83120023	Rangers G-3		1/29/2013	NDSU	neg
83120024	Rangers G-3		1/29/2013	NDSU	neg

Official San Tom from Dept. of Ag supervising

Sunrain 000217

## BRR Lot Testing 2013

## 2012 Crop

Lot #	Variety	Sample #	Date Shipped	Lab	Core #				
83120014	Ranger Russet		1/30/2013	NDSU	1200	neg			
83120015	Ranger Russet		1/30/2013	NDSU	1200	neg			
83120023	Ranger Russet		1/30/2013	NDSU	1200	neg			
83120024	Ranger Russet		1/30/2013	NDSU	1200	neg			
83100010	Russet Burbank		1/31/2013	NDSU	1200	neg			
83100012	Russet Burbank		1/31/2013	NDSU	1200	neg			
83100013	Russet Burbank		1/31/2013	NDSU	1200	neg			
83120025	84180	234	4/3/2013	NDSU	1500	pos			
83120032	Granola G1	235	4/3/2013	NDSU	4400	neg			
83120031	Granola G2	236	4/3/2013	NDSU	4400	neg			
83120027	Allian G-3	237	4/3/2013	NDSU	2200	neg			
83120029	Rumba G-3	238	4/3/2013	NDSU	2200	neg pos			
83120018	Laura G-3	239	4/4/2013	NDSU	2200	neg			
83120016	Laura G-2	240	4/9/2013	NDSU	2200	neg			
83120030	Annabelle G-3	242	4/4/2013	NDSU	2200	neg			
83120019	Annabelle G-3	243	4/9/2013	NDSU	2200	neg			
83120017	Annabelle G-2	244	4/9/2013	NDSU	2200	neg			
83120020	Red Fantasy G-2	246	4/9/2013	NDSU	2200	neg			

NDSU

PLANT DIAGNOSTIC LAB

## DIAGNOSTIC REPORT

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
206.786.3664

Fax

Email  
markj@hughes.net

Sample#	PP1300663
Field ID	234
Host	Potato
Received Date	4/4/2013
County	Blaine
State	ID

Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 234	84180
List of Diagnosis ID(s)		
Confirmed for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis sepidonicum</i> )		

Final Report

A potato sample has been evaluated. The sample consisted of approximately 1,500 stem-end cores from whole tubers (subdivided into 7 200-core subsamples and 1 100-core subsample) and it was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was detected in 8 of 8 subsamples. As a result, the lot is considered positive for *Clavibacter michiganensis* subsp. *sepedonicus*. Assays resulted in Ct values of 22.46 to 30.25 for the CefA primers/probe assay, and 22.31 to 28.81 for Cms50/Cms72a primers/probes assays. The lower the Ct value, the higher the concentration of the pathogen. These Ct values are well within the accepted range for positives.

**Method and Results Details:** The qPCR primers and probe sets used, CefA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). These primers/probes have been shown to be specific for *Clavibacter michiganensis* subsp. *sepedonicus* with a reasonable degree of confidence. Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or greater than 40, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by weather and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

Diagnosed By:

Kasia Kinzer(kasia.kinzer@ndsu.edu), Kimberly Hill(kimberly.hill@ndsu.edu)

606-2

**NDSU**

PLANT DIAGNOSTIC LAB

**DIAGNOSTIC REPORT**

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
206.786.3664

Fax

Email  
markj@hughes.net

Page 1 of 1

Sample#	PP1300664
Field ID	235
Host	Potato
Received Date	4/4/2013
County	Blaine
State	ID

**Diagnosis and Recommendations**

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 235
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis sepedonicum</i> )	

**Final Report**

A potato sample has been evaluated. The sample consisted of 24 subsamples of approximately 200 cores each (4,400 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CelsA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 35, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by weather and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

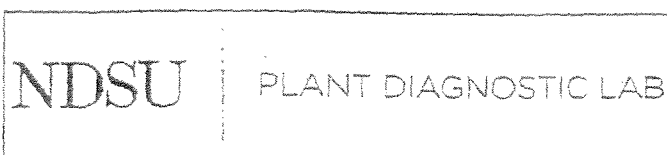
NDSU Plant Diagnostic Lab  
NDSU Dept 7660  
PO Box 6050  
Fargo ND 58108-6050  
Telephone : 701-231-7854 Fax : 701-231-7851

Diagnosed By :  
Kasia Kinzer(kasia.kinzer@ndsu.edu), Kimberly Hill (kimberly.hill@ndsu.edu)  
Completed Date: 4/19/2013

Sample#  
PP1300664

NDSU Plant Diagnostic Lab does not discriminate on the basis of race, color, national origin, religion, sex, disability, age, Vietnam Era Veterans status, sexual orientation, or marital status. Contact the Chief Diversity Officer, 205 Old Main, (701) 231-7700

66-44



## DIAGNOSTIC REPORT

Submitter:		
Mark A. Johnson		
Silver Creek Seed LLC		
PO Box 646		
Picabo ID 83348		
Phone	Fax	Email
208.788.3664		markj@hughes.net

Sample#	PP1300665
Field ID	236
Host	Potato
Received Date	4/4/2013
County	Blaine
State	ID

### Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 236
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

### Final Report

A potato sample has been evaluated. The sample consisted of 22 subsamples of approximately 200 cores each (4,400 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CeiA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 35, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by weather and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

NDSU Plant Diagnostic Lab NDSU Dept 7660 PO Box 6050 Fargo ND 58108-6050 Telephone : 701-231-7854 Fax : 701-231-7851	Diagnosed By : Kasie Kinzer(kasie.kinzer@ndsu.edu), Kimberly Hill(kimberly.hill@ndsu.edu) Completed Date: 4/19/2013
----------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------

Sample#  
PP1300665

Cell-4

**NDSU**

PLANT DIAGNOSTIC LAB

**DIAGNOSTIC REPORT**

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.788.3664

Fax

Email  
markj@hughes.net

Sample#	PP1300666
Field ID	237
Host	Potato
Received Date	4/4/2013
County	Blaine
State	ID

**Diagnosis and Recommendations**

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 237
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

**Final Report**

A potato sample has been evaluated. The sample consisted of eleven subsamples of approximately 200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CelsA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 35, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by weather and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

NDSU Plant Diagnostic Lab  
NDSU Dept 7660  
PO Box 6050  
Fargo ND 58108-6050  
Telephone : 701-231-7854 Fax : 701-231-7851

Diagnosed By :  
Kasia Kinzer(kasia.kinzer@ndsu.edu), Kimberly Hill(kimberly.hill@ndsu.edu)  
Completed Date: 4/19/2013

Sample#  
PP1300666

North Dakota State University does not discriminate on the basis of race, color, national origin, religion, sex, disability, age, marital status, or public assistance status.

666-4



**NDSU**

PLANT DIAGNOSTIC LAB

**DIAGNOSTIC REPORT**

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.788.3664

Fax

Email  
markj@hughes.net

Page 1 of 1

Sample#	PP1300667
Field ID	238
Host	Potato
Received Date	4/4/2013
County	Blaine
State	ID

**Diagnosis and Recommendations**

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 238
List of Diagnosis/ID(s)	
Confirmed for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis sepe-donicus</i> )	

**Final Report**

A potato sample has been evaluated. The sample consisted of approximately 2,200 stem-end cores from whole tubers (subdivided into eleven 200-core subsamples) and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was detected in 1 of 11 subsamples. As a result, the lot is considered positive for *Clavibacter michiganensis* subsp. *sepedonicus*. Assays resulted in Ct values of 29.27 to 35.32 for the CefA primers/probe assay, and 31.75 to 31.91 for Cms50/Cms72a primers/probes assays. The lower the Ct value, the higher the concentration of the pathogen. These Ct values are within the accepted range for positives.

**Method and Results Details:** The qPCR primers and probe sets used, CefA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). These primers/probes have been shown to be specific for *Clavibacter michiganensis* subsp. *sepedonicus* with a reasonable degree of confidence. Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 10 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or greater than 40, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by weather and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

NDSU Plant Diagnostic Lab  
NDSU Dept 7660  
PO Box 6050  
Fargo ND 58106-6050  
Telephone : 701-231-7854 Fax : 701-231-7851

Diagnosed By :  
Kasia Kinzer(kasia.kinzer@ndsu.edu), Kimberley Hill (kimberly.hill@ndsu.edu)  
Completed Date: 4/19/2013

Sample# PP1300667

Uel-4

**NDSU**

PLANT DIAGNOSTIC LAB

**DIAGNOSTIC REPORT**

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.788.3664

Fax

Email  
markj@hughes.net

Sample#	1	108
Field ID	2	
Host	1	
Received Date	4	3
County	1	
State	1	

**Diagnosis and Recommendations**

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 239
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

**Final Report**

A potato sample has been evaluated. The sample consisted of 11 subsamples of approximately 2,200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, *CelA* and/or *Cms50/Cms11*, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and placed in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soil or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (*Ct*) of the realtime PCR assay is zero, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by environmental and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

NDSU Plant Diagnostic Lab  
NDSU Dept 7650  
PO Box 6050  
Fargo ND 58108-6050  
Telephone: 701-231-7854 Fax: 701-231-7851

Diagnosed By: Kasia Kinzer (kasia.kinzer@ndsu.edu), Kimberly Hill (kimberly.hill@ndsu.edu)  
Completed Date: 4/19/2013

66-48

NDSU PLANT DIAGNOSTIC LAB

## DIAGNOSTIC REPORT

### Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.788.3664

Fax

Email  
markj@hughes.net

Sample#	PP1300687
Field ID	240
Host	Potato
Received Date	4/10/2013
County	Blaire
State	ID

### Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 240
List of Diagnosis/TD(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

### Final Report

A potato sample has been evaluated. The sample consisted of eleven subsamples of approximately 200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CelsA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 40, the pathogen is considered not detected.

**Disclaimer:** These results are based on a sample provided or collected by the submitter. The NDSU Plant Diagnostic Lab is not responsible for accuracy or uniformity within the sample. This test is designed to detect a pathogen with reasonable certainty from a given seed lot. Expression of this pathogen and losses in the field are determined by weather and additional factors. Low levels of infection may not be detected or expressed in the first year. Feel free to contact the NDSU Plant Diagnostic Lab with any questions or if additional testing is desired.

NDSU Plant Diagnostic Lab  
NDSU Dept 7660  
PO Box 6050  
 Fargo ND 58108-6050  
Telephone: 701-231-7854 Fax: 701-231-7851

Diagnosed By:  
Kasia Kinzer (kasia.kinzer@ndsu.edu)  
Completed Date: 4/19/2013

Sample#  
PP1300687

Do not write on this label. Indicate animal origin, religion, sex, disability, age, Vietnam Era Veterans status, sexual

66-49

NDSU

PLANT DIAGNOSTIC LAB

## DIAGNOSTIC REPORT

## Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.786.3664

Fax

Email  
markj@hughes.net

Sample#	PP1300669
Field ID	242
Host	Potato
Received Date	4/4/2013
County	Blaine
State	ID

Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 242
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

Final Report

A potato sample has been evaluated. The sample consisted of 11 subsamples of approximately 200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CelsA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero, the pathogen is considered not detected.

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NDSU Plant Diagnostic Lab  
NDSU Dept: 7660  
PO Box 6050  
 Fargo ND 58105-6050  
Telephone : 701-231-7854 Fax : 701-231-7851

Diagnosed By :  
Kasia Kinzer(kasia.kinzer@ndsu.edu), Kimberly Hill (kimberly.hill@ndsu.edu)  
Completed Date: 4/19/2013

Sample#  
PP1300669

66-50

NDSU

PLANT DIAGNOSTIC LAB

## DIAGNOSTIC REPORT

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.788.3664

Fax

Email  
markj@nughes.net

Field ID	243
Host	Potato
Received Date	4/10/2013
County	Blaine
State	ID

Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 243
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

Final Report

A potato sample has been evaluated. The sample consisted of eleven subsamples of approximately 200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CelsA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 40, the pathogen is considered not detected.

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NDSU Dept 7660  
PO Box 6050  
Fargo ND 58108-6050  
Telephone : 701-231-7854 Fax : 701-231-7851

Diagnosed By :  
Kasia Kinzer (kasia.kinzer@ndsu.edu)  
Completed Date: 4/19/2013

Sample#

PP130688

North Dakota State University does not discriminate on the basis of race, color, sex, religion, marital status, or sexual orientation.

66-7

NDSU

PLANT DIAGNOSTIC LAB

## DIAGNOSTIC REPORT

Submitter:

Mark A. Johnson  
Silver Creek Seed LLC  
PO Box 646  
Picabo ID 83348

Phone  
208.788.3664

Fax

Email  
markj@hughes.net

Sample#	PP1300689
Field ID	244
Host	Potato
Received Date	4/10/2013
County	Blaine
State	ID

## Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 244
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis sepedonicus</i> )	

## Final Report

A potato sample has been evaluated. The sample consisted of eleven subsamples of approximately 200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CalA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 40, the pathogen is considered not detected.

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NDSU Dept 7660  
PO Box 6050  
 Fargo ND 58108-6050  
Telephone : 701-231-7854 Fax: 701-231-7851

Diagnosed By :  
Kasia Kinzer (kasia.kinzer@ndsu.edu)  
Completed Date: 4/19/2013

Sample#  
PP1300689

International Union for Conservation of Nature (IUCN) Red List of Threatened Species

66-52



## DIAGNOSTIC REPORT

Submitter:		
Mark A. Johnson Silver Creek Seed LLC PO Box 646 Picabo ID 83348		
Phone	Fax	Email
208.788.3664		markj@hughes.net

Sample#	PP1300690
Field ID	246
Host	Potato
Received Date	4/10/2013
County	Blaine
State	ID

### Diagnosis and Recommendations

Host/Habitat	Potato ( <i>Solanum tuberosum</i> ); Cultivar: 246
List of Diagnosis/ID(s)	
Not Detected for Potato Bacterial Ring Rot ( <i>Clavibacter michiganensis</i> <i>sepedonicus</i> )	

### Final Report

A potato sample has been evaluated. The sample consisted of eleven subsamples of approximately 200 cores each (2,200 cores total), and each subsample was tested for the presence of the bacterial ring rot pathogen, *Clavibacter michiganensis* subsp. *sepedonicus*, using a sensitive and specific DNA-based method (quantitative polymerase chain reaction assay, qPCR).

*Clavibacter michiganensis* subsp. *sepedonicus* was not detected in the sample.

**Method and Results Details:** The qPCR primers and probe sets used, CeiA and/or Cms50/Cms72a, have been published (Gudmestad et al, 2009, Plant Disease 93:649-659). Samples are divided into 200-tuber or stem subsamples. Approximately one cubic-centimeter of tissue is removed from the stem end of tubers or tuber-end of stems and soaked for at least 16 hours in equal parts sterile distilled water (w:v). For each subsample, dilutions of 1:10 and 1:100 soakate or filtered slurry are subjected to realtime PCR assays. For subsamples where the crossing threshold (Ct) of the realtime PCR assay is zero or exceeds 40, the pathogen is considered not detected.

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NDSU Plant Diagnostic Lab NDSU Dept 7660 PO Box 6050 Fargo ND 58108-6050 Telephone : 701-231-7854 Fax : 701-231-7851	Diagnosed By: Kasia Kinzer (kasia.kinzer@ndsu.edu) Completed Date: 4/19/2013
----------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------

Sample#  
PP1300690

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66-53

# EXHIBIT H



**IDAHO CROP IMPROVEMENT ASSOCIATION, INC.**  
**RULES OF CERTIFICATION**  
for  
**SEED POTATOES IN IDAHO**

**PART I - GENERAL INFORMATION**

- I. Definition of terms used in the Idaho Rules of Certification for Seed Potatoes
  - A. General
    1. Certification  
The attaching of the official Idaho certification tag to a sack or bulk container of seed potatoes certifies the potatoes have met the Idaho Rules of Certification. Certification is not complete until all requirements have been fulfilled and the certification tag is attached.
    2. Certified Seed  
Potatoes that have met the Idaho Rules of Certification and have been inspected and certified for grade by the Idaho Federal-State Inspection Service and found to meet the grade requirements for certified seed at the time of inspection.
    3. General Seed Certification Standards  
The set of Idaho Rules of Certification common to all seed crops grown in Idaho.
    4. Idaho Crop Improvement Association, Inc. (ICIA)  
A grower association of certified seed producers and conditioners. In 1959, the Regents of the University of Idaho appointed the Idaho Crop Improvement Association, Inc. as its duly authorized agent to administer and conduct seed certification in Idaho.
    5. Idaho Federal-State Inspection Service  
The representative of the Idaho Department of Agriculture which ICIA authorizes, by memorandum of understanding, to conduct shipping point inspections and tagging of seed potatoes eligible for certification.
    6. Inspector  
An employee of Idaho Crop Improvement Association, Inc. or the Federal-State Inspection Service who is hired and trained to conduct various inspections or other evaluations of seed lots entered for certification.
    7. Recertification  
The process of certifying a seed lot that was certified the previous year.

8. Seed Potato Inspection Policies and Procedure Handbook  
An Idaho Crop Improvement Association, Inc. procedural handbook used by ICIA inspectors during the inspections of seed potatoes entered for certification.

B. Seed Potatoes

1. Clonal Line Selection  
An improved variety developed by a grower through a series of plant (hill) selections, growouts and reselections based on plant and/or tuber characteristics. A tuber from each hill selection is laboratory tested for viral and bacterial pathogens. Only hill selections that test negative in laboratory tests are allowed to be replanted as hill units in a Nuclear class selection plot.
2. Eligibility  
The term used to identify the acceptability of a particular seed lot to continue in the certification process because it meets all the requirements of the Idaho Rules of Certification relative to entry into the certification program.
3. Farming Operation  
A seed potato enterprise that includes all land, equipment, storage facilities and labor that are utilized in a common effort to produce certified seed potatoes.
4. Generation  
A classification scheme of seed potatoes based on the number of field production years completed. Idaho has a scheme based on a maximum of seven (7) field production years. Seed from each production year carries a different designation, i.e., Nuclear, Generation 1, Generation 2, Generation 3, Generation 4, Generation 5 or Generation 6. The terms "earlier" or "later" generation are comparative terms used to relate the number of years a particular seed lot has been in field production since its pre-nuclear origination.
5. Limited-Generation Seed  
Seed potatoes grown for a specific maximum number of field production years. In Idaho, the Limited-Generation Program provides for seven (7) field production years. Seed stocks in this program originate from a pathogen-tested source. Limited-Generation seed carries the designation of Nuclear or Generation 1 through Generation 6.

6.     Nonlimited-Generation Seed  
Seed potatoes grown without restriction to the number of field production years. In Idaho, these are usually numbered selections from breeding programs being grown on an experimental basis. Nonlimited-generation seed may also be an experimental line of an established cultivar that differs significantly from the main cultivar. Nonlimited-generation seed carries the designation of Experimental (EXP).
7.     Seed  
The vegetatively propagated tubers used for potato production rather than true botanical seed sexually produced from potato flowers.
8.     Seed Farm  
A field or group of fields entered for certification on a single application. A farming operation may enter seed potatoes for certification from more than one seed farm.
9.     Seed Lot  
A field or a group of fields producing seed potatoes or the potatoes (tubers) harvested from a seed potato field, identified with a certification number and a North American Plant Health Certificate, enabling identity preservation and tracking.
10.    Contact Lot  
A seed lot produced on a farming operation using common production and handling equipment and/or storage facilities.
11.    Sister Lot  
All seed lots originating from the same lot of seed stock.
12.    Seed Stock  
Seed potatoes intended for use as a planting source for certification that are identity preserved with a certification number and a North American Plant Health Certificate.
13.    Field. A parcel of land that has the boundaries of the parcel identified by the owner or operator of the land. A field may be designated by a map, GPS, or other method so that the boundaries are clearly defined.

C. Certification

1. Applicant  
The grower, growers or entity that enters seed potatoes for certification.
2. Application  
The form an applicant for certification completes and submits to ICIA. The applicant identifies all seed stocks to be entered for certification and provides ICIA with specific information about the seed stocks used in planting. Maps are required to specify directions for locating all lots listed on the application. Payment for the services is also to be included at time of application.
3. Certification Factor  
Any organism, condition or process that is regulated by the Idaho Rules of Certification for seed potatoes.
4. Certification Process  
The series of five (5) inspections to which seed lots are subjected and which must be passed in order to be certified are as follows:
  - a. two (2) summer field inspections
  - b. a storage inspection
  - c. a post harvest test
  - d. a shipping point inspection.Seed lots, or portions thereof, which are shipped prior to post harvest testing will be certified based on the two (2) summer field inspections and a shipping point inspection.
5. Disqualification  
Removal of eligibility for certification status from seed potatoes entered for certification due to not meeting all the specific requirements of the Idaho Rules of Certification.
6. Downgrading  
The process of changing the generation designation of a seed lot. This is due to failing to meet a specific tolerance of the generation for which the seed was entered for certification. The seed lot is given the next appropriate later generation designation for which the seed lot does not exceed the generation tolerance.
7. Hill Unit  
An identifiable section of a Nuclear class production field corresponding to the planting of whole or cut seed tubers collected from a single potato plant in the previous year's crop.

8. Post Harvest Testing  
Tubers submitted to ICIA by an applicant for certification or collected by ICIA inspectors are tested by either a winter growout or by direct-tuber testing in the laboratory.
9. Roguing  
The seed potato production practice of removing or destroying undesirable potato vines and tubers in a field.
10. Tolerance  
The maximum amount of a certification factor allowed in a seed lot of a particular generation.
11. Volunteers  
Potato plants growing in a seed potato field that originate not from the seed planted but from tubers left in the field during a previous year's harvest.
12. Zero Tolerance Factor  
Zero tolerance means that none is allowed in a seed lot. If one or more of a zero tolerance factor is found at any time in a seed lot, that lot will be disqualified for certification. It does not mean, nor may it be construed to mean, that a lot that passed inspection is free from the zero tolerance factor. It means only that none was found during the normal course of the inspection process. Zero tolerance factors in Idaho include but may not be limited to:
  - a. Bacterial Ring Rot
  - b. Root-Knot Nematode
  - c. Corky Ring Spot diseases.

D. Storage

1. Seed Lot Identification  
The tracking and documentation of eligible seed lots while they are in storage. Seed lot locations are mapped by ICIA inspectors during storage inspection and are maintained during the storage season by ICIA. The documentation is provided to the Idaho Federal-State Inspection Service for its use during shipping point inspection.
2. Shipping Point Inspection  
The inspection of seed potato tubers after sorting and grading but prior to shipment. This inspection is conducted by the Idaho Federal-State Inspection Service.

3. Tagging  
The attaching of an official certification tag to a bag or bulk container of seed potatoes after a shipping point inspection.

E. Diseases and Pests

1. Bacterial Ring Rot  
Disease caused by the bacterium *Clavibacter michiganensis* ssp. *sepedonicus*.
2. Blackleg  
Disease caused by the bacterium *Pectobacterium atrosepticum* (formerly known as *Erwinia carotovora* ssp. *atroseptica*) or *Pectobacterium carotovorum* ssp. *carotovorum* (formerly known as *Erwinia carotovora* ssp. *carotovora*).
3. Corky Ring Spot (Spraing)  
Disease caused by tobacco rattle virus.
4. Late Blight  
Late blight is a disease caused by the fungus *Phytophthora infestans*.
5. Root-Knot Nematode  
The plant parasitic nematodes *Meloidogyne hapla* or *Meloidogyne chitwoodii*.
6. Mosaic virus. Includes Potato Virus Y (PVY) and all of its various strains, PVA and other viruses including severe forms of PVX.
7. Potato Leaf Roll Virus (PLRV).

## II. Seed Classification

- A. Idaho is following a Generation program. The classes of seed in this program are as follows:

1. Pre-nuclear (PN)  
Pre-field stocks for laboratory and greenhouse productions or direct field plantings. Types of PN material include:
  - a. stem cuttings
  - b. tissue cultured plantlets
  - c. microtubers
  - d. greenhouse-produced tubers (minitubers)
  - e. laboratory-tested line selections.
2. Nuclear (N) .....1st field production and meets N tolerances
3. Generation 1 (G1) .....2nd field production and meets G1 tolerances
4. Generation 2 (G2) .....3rd field production and meets G2 tolerances
5. Generation 3 (G3) .....4th field production and meets G3 tolerances
6. Generation 4 (G4) .....5th field production and meets G4 tolerances
7. Generation 5 (G5) .....6th field production and meets G5 tolerances
8. Generation 6 (G6) .....7th field production and meets G6 tolerances

Each generation of seed is derived from planting the previous generation. At planting, the seed stock that was planted is automatically moved down one generation. For example, PN becomes N, G3 becomes G4. Seed stocks have to meet tolerances for the generation in which they are classified, regardless of field year production.

- B. Experimental (EXP) Class  
Non-released breeding selections and cultivars which have been developed with specific added properties not present in the main line of the cultivar. Experimental seed stocks may be nonlimited-generation or limited-generation seed.
- C. Line Selections  
The suffix "LS" following the generation designation denotes a seed lot that was derived by clonal line selection.

## III. Application and Inspection Fees

- A. An application to grow potatoes for certification must be postmarked by June 10. Applications submitted after June 10 have a 15 day grace period which requires a 10% late fee to be paid with the application. No applications postmarked after June 25 will be accepted.

- B. For Inspection Fees, and Application Deadlines please refer to the Seed Certification Fee and Application Schedule within the Standards Link at [www.idahocrop.com](http://www.idahocrop.com)
- C. Laboratory testing of Pre-nuclear and greenhouse stocks and Nuclear line selections require an additional fee. Contact the Idaho Crop Improvement Association, Inc. Seed Certification Laboratory, Idaho Falls, for details.

#### IV. Appeal Inspections

- A. An inspector will make an appeal inspection where time, weather, and crop conditions permit and where factors affecting the original decision have not been altered.
- B. An appeal inspection will be handled on an individual basis. A normal appeal process must be followed and justification for such an appeal inspection will be the decision of the ICIA area manager and/or executive vice president. Any evidence of roguing after the initial inspection prior to the appeal inspection will result in acceptance of the initial inspection report.
- C. The Idaho Crop Improvement Association, Inc. Board of Directors may be involved with final appeal decisions.

#### V. Reinspection of Generations 2 and 3

- A. If a reinspection of a Generation 2 or 3 seed lot is desired, the person requesting this service must submit a request, in writing or by telephone, to the Idaho Falls office of Idaho Crop Improvement Association, Inc. within five (5) days following the date of the initial inspection. A fee of \$80.00 must accompany the request. The field must be rogued and ready for reinspection five (5) working days after the reinspection request is received by the Idaho Falls office.

#### VI. Potato Virus X (PVX) Testing Program

- A. Any seed lot designated Nuclear, G1, or G2 that meets the generation tolerance for PVX will be identified as such by carrying the "PVX" prefix with its generation name.
- B. Seed lots that were found to have a percentage of PVX greater than the generation tolerance will not carry a "PVX" identification prefix in the Idaho Seed Potato Grower Directory but will not be downgraded.
- C. Downgrading to a later generation in order to maintain the PVX identification prefix is allowed but must be requested by the seed grower.



- D. Any seed lot that loses its PVX designation cannot regain the designation in future years.

VII. Procedure for Tagging and Sealing Bulk Seed Potatoes

- A. Bulk potatoes eligible to be tagged and sealed must have been graded to meet at least the minimum standards for the specified grade.
- B. A certification tag with the following information shall be attached with an official seal to the container in such a manner that the unloading mechanism cannot operate without breaking the seal.
- |                                                    |                            |
|----------------------------------------------------|----------------------------|
| a. Variety                                         | f. Grower                  |
| b. Class                                           | g. Buyer's name - optional |
| c. Weight                                          | h. Certification number    |
| d. Truck and/or trailer license numbers - optional | i. Inspector's name        |
| e. Seal number                                     | j. Date inspected          |
- C. A temporary seal attached by a federal-state inspector may seal a holding container for up to 6 days (not inclusive of date inspected). Seed lots held for longer than 6 days (Not inclusive of date inspected) must have a federal-state inspection when seed is being loaded onto the transport vehicle and will tag and seal each container.

VIII. Procedure for Tagging Bulk Cut Seed Potatoes

- A. In order to be eligible for tagging, seed potatoes that will be cut prior to shipment must have been graded and inspected for grade prior to cutting and have met the minimum standards for a specific Idaho seed potato grade.
- B. The cut seed will be tagged and sealed as outlined in Section VII of these regulations.
- C. The words "Cut Seed" will be stamped on the front of the seed grade tag.
- D. Cut seed that will be stored for a period of time before shipment may be tagged and sealed at a later date as bulk certified seed if the seed lot identity is maintained, and if the seed was graded and inspected prior to cutting.
- E. The Idaho Crop Improvement Association, Inc. must be notified as to where the cut seed is being stored.
- F. A federal-state inspector must be present when any cut seed is being loaded on and will tag and seal each container.

## IX. Tagging Exception for Pre-nuclear and Nuclear Seed Potatoes

- A. An Idaho Crop Improvement Association, Inc. "Certificate of Exception for Grade" may be used for any greenhouse produced Pre-nuclear seed potatoes.
- B. An Idaho Crop Improvement Association, Inc. "Certificate of Exception for Grade" may be used for Nuclear class seed potatoes after a federal-state inspection shows that they cannot be tagged as yellow tag grade because of shape factors.
- C. The following conditions must be met:
  - 1. This document can only be used for re-certification in the above mentioned seed classes within Idaho. Seed for out-of-state sales must meet blue, green or yellow tag requirements.
  - 2. Approval must be sought at least seven (7) days prior to the potato shipment and all documentation must be signed by the buyer and seller prior to shipment.
  - 3. An Idaho Crop Improvement Association, Inc. inspector will supervise the shipment.

## X. Sacking Seed Potatoes

- A. If seed potatoes are to be sacked, they must be packed in new sacks. Misprinted, misbranded, blotted, reject sacks and/or sacks turned inside out must not be used.
- B. New sacks that have been emptied in order to resort the potatoes shall not be reused if the sacks show stains or if the sacks show appreciable damage.

## XI. Tagging Seed Potatoes for Export

- 1. Certified seed lots intended for export may be tagged with an official ICIA White Export Tag in lieu of an official ICIA certification tag of any other color. Export lots must meet all standards for certification and grade as established by the Idaho Rules of Certification.
- 2. Grade shall be Idaho Certified plus any Import Permit or importing country protocol requirements.
- 3. Tags shall be white and state the following: IDAHO EXPORT GRADE SEED POTATOES, VARIETY, CERTIFICATION NUMBER, GENERATION (G3,G4, etc.) and other language required by the importing country.

## XII. Sanitation

- A. Farming and sanitation practices are the responsibility of the grower. Official inspections do not relieve the grower of this responsibility.

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XIII. Disclaimer Representation and Limitation of Remedy and Liability

- A. Since the use of certified seed potatoes is beyond the control of the grower, the seller, the inspector, the Idaho Federal-State Inspection Service and the Idaho Crop Improvement Association, Inc. Make **NO** representation of any kind, expressed or implied, including merchantability, fitness for a particular purpose, quality or freedom from disease, is made concerning certified seed potatoes which extends beyond the description set forth.
- B. The grower, the seller, the inspector, the Idaho Federal-State Inspection Service and the Idaho Crop Improvement Association, Inc. shall not be liable under any theory, including breach of warranty, negligence or strict liability, for any special or consequential loss or damage, including lost profits, resulting from the use of certified seed potatoes.
- B. By acceptance of certified potatoes, the buyer expressly agrees that the buyer's exclusive remedy for breach of any duty owed the buyer, with respect including negligence and strict liability, shall be of the seed. In addition, by acceptance of certified seed potatoes, the buyer expressly agrees that the disclaimer or representation and limitation of remedy and liability set forth herein are express conditions of the sale, and agreement between the parties regarding liability or remedy.

RULES OF CERTIFICATION  
for  
SEED POTATOES IN IDAHO

PART II - SEED POTATO REGULATIONS

I. General Certification Standards

- A. The General Certification Standards as adopted by the Idaho Crop Improvement Association, Inc. are basic and together with these specific standards, the Idaho Crop Improvement Association, Inc. Seed Potato Inspection Policies and Procedures Handbook, constitute the standards for certification of seed potatoes.

II. Seed Farm Eligibility Requirements

- A. All potato acres on a seed farm must be entered and maintained for seed potato inspection and certification. A portion of the acres on a seed farm can be withdrawn from certification with ICIA approval.

III. Seed Stock Eligibility Requirements

- A. Limited-generation seed stocks are eligible for certification for seven (7) field production years. Generation 6 seed stocks, the 7th field production year, are not eligible for certification.
- B. Nonlimited-generation seed stocks are eligible for an unlimited number of field production years. However, once a breeding selection has been named, certified Nonlimited-generation seed stocks are only eligible for an additional three (3) years as EXP 1, EXP 2 and EXP 3.
- C. All seed stocks purchased by a farming operation from another farming operation and subsequently entered for certification must be tagged unless the purchaser was a co-applicant for certification of that seed.
- D. The eligibility of seed purchased for recertification must be verified by both of the following:
1. A notarized affidavit and one tag representing each purchased seed lot or a tag from each truck (trailer) load of seed or inspection certificate(s) representing all purchased seed.

2. An Idaho Plant Health Certificate or a North American Plant Health Certificate.

This documentation must accompany the application.

- E. All contact lots on a farming operation shall be ineligible for recertification if any lot of seed on that farming operation is rejected for certification because of bacterial ring rot.
- F. Out-of-state potato stocks to be entered for certification must meet the same requirements as Idaho grown seed stocks.
- G. Seed lots with more than 0.1% Potato Leafroll Virus in either the 1st or 2nd inspection shall not be eligible for recertification.
- H. Nuclear, G1 or G2 seed lots disqualified for certification in the post harvest test because of seed-borne chemical injury may only be recertified by the original applicant(s) during the next growing season.
- I. All seed lots entered for recertification will be laboratory tested by ELISA prior to acceptance into the seed certification program. The ELISA testing must be performed on actively growing sprouts (1/4" or greater) or on green leaf tissue.

#### IV. Land Requirements

- A. A field will not be eligible to produce certified seed potatoes if Root-Knot Nematode, or Corky Ring Spot has been proven to exist in the field or in potatoes grown in that field.
- B. A field will not be eligible to produce certified seed potatoes if noncertified potatoes or potatoes that have been confirmed to be Bacterial Ring Rot infected by a laboratory test were grown in this field the previous two growing seasons.
- C. A field must have been farmed with a crop other than potatoes immediately following the growing season in which potatoes were disqualified for Bacterial Ring Rot.

#### V. Field Isolation Requirements

- A. Potatoes entered for certification must be planted at least 20 feet from potatoes not entered for certification.

Seed lots must be separated from each other by at least one row left unplanted or planted to some other crop. Exceptions are made with ICIA approval and only apply to lots less than five (5) acres that include distinct field markers.

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Seed Potatoes-13

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- B. Potatoes entered for certification as two seed lots of the same variety in the same field and found not to have the proper separation will be designated as a single seed lot with the latest generation designation of the two seed lots.

## VI. Field Inspection Requirements

- A. Two inspections shall be made for each field entered.
- B. Field Inspection tolerances for 1st and 2nd Inspections

Table 1 - Percentages allowed for 1st inspection<sup>1</sup> NOTE: Footnotes continue on Seed Potatoes-14

Factor <sup>2</sup>	Generation					
	Nuclear	Gen 1	Gen 2	Gen 3	Gen 4	Gen 5/6
Varietal mixture	0.00	0.00	0.02	0.10	0.25	0.50
Well defined Mosaic	0.00	0.00	0.5	1.00	1.50	2.00
Potato Leafroll	0.00	0.00	0.03	0.05	0.10	0.20
Blackleg <sup>3</sup>	0.00	0.10	0.50	1.00	2.00	.. <sup>4</sup>
PVX	0.00	0.50	2.00			
Total Virus <sup>5</sup>						2.00

Table 2 - Percentages allowed for 2nd inspection<sup>1</sup>

Factor <sup>2</sup>	Generation					
	Nuclear	Gen 1	Gen 2	Gen 3	Gen 4	Gen 5/6
Varietal mixture	0.00	0.00	0.01	0.05	0.10	0.20
Well defined Mosaic	0.00	0.00	0.25	0.50	0.75	1.00
Potato Leafroll	0.00	0.00	0.02	0.03	0.08	0.20
Blackleg <sup>3</sup>	0.00	0.10	0.50	1.00	2.00	.. <sup>4</sup>
Total Virus <sup>5</sup>						1.00

<sup>1</sup>Field inspections of Nuclear and Generation 1 seed lots are advisory and all factors are required to be rogued when found in order to maintain the tolerance of 0.00%.

<sup>2</sup>Some diseases may be present in a seed potato lot and not exhibit symptom expression in plants or tubers at the time of a regular inspection.

<sup>3</sup>Determination of blackleg disease is based on a visual plant symptom of an inky black stem originating from the seed tuber. Visible blackleg has no tolerance in Generations 5 and 6 and therefore is not a disqualification factor.

<sup>4</sup>Visible blackleg will not be a disqualification factor in G5 or G6.

<sup>5</sup>Total is the combined percentage of potato leafroll, calico, well defined mosaic and all other viral, viroid and mycoplasma-like disease (haywire, witches' broom, aster yellows, etc). This does not include Potato Virus X (PVX).

- C. Fields shall be considered ready for inspection at all times. Additional inspections may be made at the discretion of the fieldman, but will not be made in order to allow growers to rogue fields which will not pass inspection. In the event a field receives a first inspection before it is rogued, it may be reinspected one time if it is disqualified because of a rogueable viral or varietal mixture problem. Reinspection will not be allowed if there is evidence of rogueing when the first inspection is done.
- D. Seed lots that exceed the generation tolerance for a particular factor will be downgraded to the next generation for which the seed lot does not exceed the tolerance.
- E. Volunteers must be rogued from any field of Nuclear or Generation 1 seed potatoes. Generation 2 through Generation 6 fields that show volunteer potato plants will remain eligible for certification when the volunteer plants are not found in excess of 3 % of the total plants in the field. Volunteer plants shall be considered as part of the field from the standpoint of all factors of inspection.
- F. Generation 2 and 3 fields downgraded but not disqualified at the time of either the regular 1st or 2nd inspection because of a rogueable viral or varietal mixture problem may be reinspected one time.
- G. Any seed lot will only be allowed one reinspection during the season.
- H. Non-Generational Experimental seed must meet Generation 4 inspection requirements to be eligible for recertification.
- I. Chemical Injury
  - 1. The fieldman is given authority to withhold certification pending the outcome of the winter test plot growout or refuse certification on a field or portion of a field sprayed or contaminated with a chemical that causes seed-borne injury to seed potatoes.
  - 2. Those portions of a field that show enough chemical injury to the potato foliage to interfere with the field inspection process shall be rejected from certification if the potatoes are stored.



3. Those portions of a field that do not show enough chemical injury to interfere with field inspections but still may be contaminated to the degree that seed-borne chemical injury may occur in the next crop, shall be harvested and stored separately from other potatoes in that seed lot.
  4. Under the direction of a fieldman, a separate winter test sample shall be collected and submitted from those potatoes with the possible chemical injury.
  5. Certification will be withheld until winter test readings are completed.
- J. The following are seed lot disqualifying conditions:
1. Seed lots or portions thereof may be disqualified for certification because of any condition that interferes with the inspection of the potato plants.
  2. Bacterial ring rot, corky ring spot and root-knot nematode are zero tolerance factors. Any seed lot, regardless of generation, shall be rejected from certification at any time when any of these factors is confirmed by laboratory testing.
  3. Evidence of failure to remove daughter tubers from rogued hills.

4. When bacterial ring rot is confirmed in a seed lot:

- a. The certifying agency shall identify sister and contact lots. The certifying agency shall cooperate on trace back efforts with the Idaho State Department of Agriculture.
- b. A random sample from all contact and sister lots shall be obtained by the certifying agency:
  - i. Contact lots shall remain eligible for certification provided that a laboratory test is negative for bacterial ring rot prior to final certification. A random sample of 1200 stems or tubers shall be required for seed lots that are ten acres or greater. For lots smaller than ten acres, the sample size shall be determined by the certification agency.
  - i. Sister lots shall remain eligible for recertification provided that a laboratory test of 4400 stems or tubers is negative for bacterial ring rot.
  - ii. Testing requirements may be appealed by the applicant. The normal appeal process must be followed and justification for such an appeal shall be the decision of the ICIA area manager and/or executive vice president.
- c. The sanitation protocols, equipment, and facilities of affected farming operation(s) shall be inspected by the certifying agency prior to the receipt of new seed stocks.
- d. Seed lots produced on affected farming operation(s) shall be laboratory tested for bacterial ring rot for a period of five years following the initial find. A random sample of 1200 stems or tubers shall be negative for bacterial ring rot prior to final certification for seed lots that are ten acres or greater. For lots smaller than ten acres, the sample size shall be determined by the certification agency.

5. The presence of any disease new or exotic to the state of Idaho.
  6. Failure to list on an application all sources of the seed lots that were used to plant a particular seed lot will automatically disqualify that seed lot from certification.
  7. Potatoes which are not harvested and left to overwinter in the ground and are dug in the spring are not eligible for recertification or for tagging as certified seed.
  8. Failure to have potatoes graded, inspected and tagged at shipping.
- K. Seed lots are subject to the guidelines of the current Canada/US Management Plan for potato viruses that cause Tuber Necrosis.

#### VII. Post Harvest Testing Requirements

- A. Each seed lot must be post harvest tested. Lots, or portions thereof, which are shipped prior to post harvest testing will be certified based on the two (2) summer field inspections and a shipping point inspection.
- B. Only seed lots that have passed the equivalent of a 2nd field inspection will be eligible for post harvest testing.
- C. The number of single drop tubers to submit for winter testing, regardless of generation or testing format:
 

Lots representing one acre or more.....	400 tubers
Lots representing 0.5 – 0.9 acres.....	200 tubers
Lots representing 0.1 – 0.4 acres.....	100 tubers
- D. Seed lots are disqualified for certification if seed-born chemical injury in excess of 5% is found during post harvest testing.
- E. Seed lots are not eligible for recertification if any of the following factors are found during post harvest testing at a percentage greater than:
 

Potato Leafroll Virus	0.8%
Well defined Mosaic	2.0%

#### VIII. Potato Virus X (PVX) Testing Requirements

- A. All seed entered for certification in the Nuclear, G1 and G2 classes must be laboratory tested for PVX.

IX. Bacterial Ring Rot Testing Requirements

- A. A random sample of stems or tubers obtained from all seed lots entered for certification, G1 or higher, shall be laboratory tested for bacterial ring rot. The minimum sample size shall be 200 stems or tubers for seed lots 0.1 acres or less and 400 stems or tubers for seed lots exceeding 0.1 acres.

X. Pre-nuclear Production Requirements

- A. Source: Meristem culture of tubers from breeding projects or tubers from lots of Nuclear, G1 and G2. Exceptions will be allowed with Idaho Crop Improvement Association, Inc. approval.
- B. Greenhouse Production: New (sterilized) growth media shall be used for each planting.
- C. Greenhouse Pre-nuclear crops may be entered for certification at any time as soon after the crop is planted as possible. A minimum of two inspections shall be performed on each Pre-nuclear seed lot entered. The responsibility of notifying Idaho Crop Improvement Association, Inc. of readiness for inspection of greenhouse Pre-nuclear crops shall rest with the grower.
- D. Each of the following organisms shall be tested for in Pre-nuclear seed production:
- |                  |                                      |
|------------------|--------------------------------------|
| Base Cultures:   | Bacterial Ring Rot                   |
| (Entry Level)    | <i>Pectobacterium (Erwinia) spp.</i> |
|                  | Potato Viruses X, Y, M, A, S         |
|                  | Potato Leafroll Virus                |
|                  | Potato Spindle Tuber Viroid          |
| Greenhouses:     | Bacterial Ring Rot                   |
|                  | <i>Pectobacterium (Erwinia) spp.</i> |
|                  | Potato Virus X, Y, A                 |
|                  | Potato Leafroll Virus                |
| Line Selections: | Bacterial Ring Rot                   |
|                  | <i>Pectobacterium (Erwinia) spp.</i> |
|                  | Potato Virus X, Y, A                 |
|                  | Potato Leafroll Virus                |
| Mother Plants:   | Bacterial Ring Rot                   |
| (Stem Cuttings)  | Potato Virus X, Y, A                 |
|                  | Potato Leafroll Virus                |

Entry level cultures, line selection hill units or mother plants used in stem cuttings that are found to be infected with any of the indicated organisms shall be ineligible for use in Pre-nuclear seed production. Units or lots in greenhouse production found to be infected with any of the indicated organisms shall be downgraded to the next generation for which the seed lot does not exceed the generation tolerance of the organism that causes the certification factor (e.g. *Pectobacterium* (*Erwinia*) spp. is a causal agent for blackleg).

E. Clonal Line Selections:

1. One tuber from each plant selected shall be submitted to ICIA for laboratory testing.
2. Nuclear plots planted from clonal line selections shall be planted in hill units.
3. All seed in a clonal line selection plot automatically advances to G1 the following season except for those hills selected for clonal selections.

XI Storage and Shipping Point Inspection Requirements

- A. Storage inspection will be conducted on all storages containing seed potatoes eligible for certification.
- B. Storages where sprout nip or similar materials were used the previous season are not eligible to store seed potatoes eligible for certification.
- C. Seed potatoes must not be stored, graded or handled in storage warehouses or subdivisions thereof in which potatoes that have not been field inspected, or are laboratory confirmed to have Bacterial Ring Rot, Root-Knot Nematode or Corky Ring Spot are stored or handled.
- D. All storages shall be available for inspection at all times.
- E. For a seed lot to remain eligible for certification, seed lot identity must be maintained in storage.
- F. Seed lots must remain entirely separate in storage:
  1. If seed lots from two different farming operations are stored in the same storage.
  2. If seed lot identity is to be maintained for different lots from the same farming operation.
  3. If seed lots of different varieties are being stored in the same storage.

- G. A fabric barrier of a type approved by Idaho Crop Improvement Association, Inc. may only be used between lots of the same variety grown by the same farming operation.
- H. Co-mingling of seed lots of the same variety from the same seed farm will result in all potatoes in these lots receiving the poorest field inspection reading of any of the lots as well as the latest generation.
- I. Seed potatoes will not be washed without written permission from ICIA. Permission may include requirements and conditions.
- J. The Idaho Crop Improvement Association, Inc. inspector and Idaho Federal-State inspector are given authority to refuse to tag and seal any seed potatoes for any condition or situation that may bring certification into disfavor or make an accurate inspection impossible.

## XII Grade Requirements

### A. Idaho Certified Blue Tag Seed Potatoes

The blue tag shall be equivalent to U.S. No. 1 seed potato grade with the following exceptions. There is a 1% tolerance for late blight.

- 1. Scab - shall not cover more than one-fifth of the surface area.
- 2. Adhering dirt - a maximum of 50% of the tuber surface may be covered with caked dirt.
- 3. Loose dirt and/or foreign material - included in total external tolerance.
- 4. Clipping or trimming not allowed.
- 5. Freshly broken off second growth - shall not be damaged.
- 6. Wireworm and/or grub - damaged by waste.
- 7. Tolerances: For total defects 10%. Three percent (3%) for potatoes which are affected by freezing injury. One percent (1%) for potatoes which are affected by soft rot, wet breakdown or are frozen. The limitations for external and internal defects shall apply as written in the U.S. No. 1 seed potato grade.
- 9. An additional 10% may be damaged, but not seriously, by shape.

B. Idaho Certified Green Tag Seed Potatoes

The green tag grade shall be equivalent to the U.S. No. 2 grade with the following exceptions. There is a 1% tolerance for late blight.

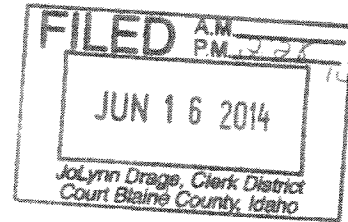
1. Maximum and minimum size shall be specified by the grower.
2. Wireworm and/or grub - serious damage by waste. Permit an additional six percent (6%) serious damage by waste.
3. Scab - shall not cover more than one-fifth (1/5) of the surface area.
4. Hollowheart - no requirements.
5. Adhering dirt - no requirements.
6. Loose dirt and/or foreign material - included in total external tolerance.
7. Varietal purity - not more than 0.2% of other tuber identifiable varieties.
8. Clipping - shall not be clipped or trimmed.
9. Second growth - shall not be seriously damaged.
10. Sunburn and light greening - no requirements.
11. Appearance - discoloring of tubers caused by immaturity or the characteristic checking of tubers that occurs under normal conditions shall not disqualify them.
12. Growth cracks - not to exceed a maximum of 10% serious damage.
13. Mechanical injury - shall not be damaged by waste.
14. Air cracks - damage by waste.
15. Serious damage by dry or moist type tuber rot - 2%.
16. Sprouts - no requirements.
17. Flattened depressed and sunken discolored areas showing no underlying flesh discoloration - no requirements.

C. Idaho Certified Yellow Tag Seed Potatoes

The yellow tag grade shall be equivalent to the U.S. No. 2 grade with the following exceptions. There is a 1% tolerance for late blight.

1. Maximum and minimum size shall be specified by the grower.
2. Wireworm and/or grub - no requirements.
3. Scab - no requirements.
4. Hollowheart - no requirements.
5. Adhering dirt - no requirements.
6. Loose dirt and/or foreign material - included in total external tolerance.
7. Varietal purity - not more than 0.2% of other tuber identifiable varieties.
8. Clipping - shall not be clipped.
9. Second growth - shall not be seriously damaged.
10. Sunburn and light greening - no requirements.
11. Appearance - no requirements except second growth.
12. Growth cracks - no requirements.
13. Mechanical injury - shall not be seriously damaged by waste.
14. Six percent (6%) serious damage by internal discoloration. Percentages higher than six percent (6%) allowed with Idaho Crop Improvement Association, Inc. approval if laboratory tests show the internal discoloration is not of pathogen origin.
15. Serious damage by dry or moist type tuber rot - 2%.
16. External discoloration – no requirements.
17. Flattened depressed and sunken discolored areas showing no underlying flesh discoloration – no requirements.
18. Rhizoctonia – no requirements
19. Sprouts – no requirements.

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 Email: gaffney@beardstclair.com



Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
 BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
 limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
 limited liability company,

Defendants-Counterclaimant.

Case No.: CV-2013-644

AFFIDAVIT OF ARON DERBIDGE

STATE OF IDAHO )  
 )ss.  
 County of Bonneville )

I, Aron Derbidge, having been duly sworn on oath, depose and state:

1. I am competent to testify and do so from personal knowledge.

2. I am the Business Manager for Sunrain Varieties LLC (Sunrain) am

personally familiar with the transaction of business between Sunrain and Silver Creek Seed, LLC (Silver Creek). I was the primary point of contact with regarding the Blanket Variety Contract and the 2012 growing season.

AFFIDAVIT OF ARON DERBIDGE - 1



3. Prior to learning of a bacterial ring rot issue in Silver Creek's 2012 seed potato crop, Sunrain took delivery of approximately 6,700 cwt of seed potatoes, including approximately 5,500 cwt of variety A84180-8, and had them delivered to growers for the 2013 production year.

4. On or about March 29, 2013, Sunrain was notified of the discovery of Bacterial Ring Rot in the A84180-8 seed potatoes grown by Silver Creek during the 2012 crop year.

5. Upon learning of the bacterial ring rot, Sunrain notified the grower who had received the A84180-8 variety seed and informed the grower of the issue.

6. Sunrain immediately notified Silver Creek that it was rejecting the entire seed potato crop with the exception of those already received and delivered to growers and that it would not be willing to accept any of the seed potatoes grown by Silver Creek as seed potatoes because the risk of problems with every variety was too high.

7. After notifying Silver Creek that Sunrain was rejecting the seed crop and would not accept any seed potatoes from Silver Creek, Sunrain, as a show of good faith, informed Silver Creek that it would be willing to help Silver Creek clear the potatoes from storage either as fresh grade consumer potatoes or as cattle feed.

8. Silver Creek accepted Sunrain's offer to help clear the stored potatoes and a new agreement was reached separate and apart from the Blanket Variety Contract under which Sunrain would determine if the potatoes could be packed out as fresh pack and would help Silver Creek clear the stored potatoes either through the fresh pack process or as cattle feed.

9. Sunrain took delivery of approximately 651 cwt of the Annabelle variety to determine whether they could be packaged as fresh pack for the consumer market.

10. The effort failed and the Annabelles could not be packaged for the consumer market and Sunrain rejected them as fresh pack potatoes.

11. Sunrain notified Silver Creek that the fresh pack experiment had failed and it could not take delivery of any potatoes as fresh pack potatoes, but that it would still be willing to help Silver Creek clear the storage by moving the potatoes as cattle feed through its connections in the cattle industry.

12. Silver Creek informed Sunrain that it wanted the storage cleared and Sunrain informed Silver Creek that it was willing to retrieve the rejected potatoes from Silver Creek's storage as cattle feed.

13. Sunrain made it clear that it was only willing to pick up the rejected potatoes and sell them off as cattle feed and that it would return the cattle feed price to Silver Creek.

14. Silver Creek then allowed Sunrain to move forward with selling the potatoes as cattle feed and to pick up loads of the rejected seed potatoes from Silver Creek's storage facilities and delivered the loads as cattle feed to cattle operations.

15. Only after knowingly allowing Sunrain to take delivery of rejected potatoes as cattle feed after the potatoes were delivered by Sunrain to cattle operations did Silver Creek assert that it was entitled to demand full seed potato prices notwithstanding Sunrain's earlier rejection of the potatoes as seed potatoes and Silver Creek's consent to sell them as cattle feed.


*granted motion  
to strike  
9/6-15 of Derbridge*

16. Because of Silver Creek's refusal to accept cattle feed prices, Sunrain discontinued its efforts to assist Silver Creek in clearing its storage facilities of the rejected seed potatoes and this litigation then followed.

Date: June 16, 2014

  
Aron Derbidge

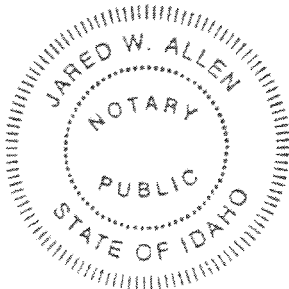
Subscribed and sworn to before me on this 16 day of June, 2014.

  
Notary Public for Idaho

Residing at: *IDAHO FALLS, ID*

My Commission Expires: *9-17-2016*

(SEAL)



**CERTIFICATE OF SERVICE**

I certify I am a licensed attorney in the state of Idaho and on June 16, 2013, I served a true and correct copy of the AFFIDAVIT OF ARON DERBIDGE on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669

☐

U.S. Mail

☐

Hand-delivered

☒

Facsimile

Blaine County Courthouse  
201 2<sup>nd</sup> Avenue S., Ste 106  
Hailey, ID 83333  
Fax: (208) 788-5527

☐


U.S. Mail

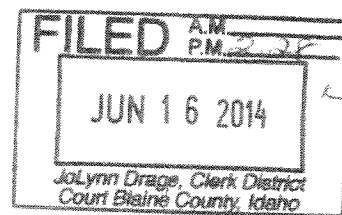
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for Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant



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Attorney for Respondent

DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO

SILVER CREEK SEED, LLC, an Idaho  
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SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

Case No.: CV-2013-644

AFFIDAVIT OF LISA SWENSON

STATE OF IDAHO     )  
                              )ss.  
County of Bonneville )

1, Lisa Swenson, having been duly sworn on oath, depose and state:

1. I am competent to testify and do so from personal knowledge.
2. I am the Treasurer for Sunrain Varieties LLC (Sunrain) and am

responsible for oversight of its financial dealings including payment of its accounts payable and collection of its accounts receivable.

AFFIDAVIT OF LISA SWENSON - 1

3. I am personally familiar with the transaction of business between Sunrain and Silver Creek Seed, LLC (Silver Creek), including specifically the payment history from Sunrain to Silver Creek for seed potatoes grown during the 2012 crop year.

4. Prior to learning of a bacterial ring rot issue in Silver Creek's 2012 seed potato crop, Sunrain took delivery of approximately 6,700 cwt of seed potatoes and had them delivered to growers for the 2013 production year.

5. On or about March 29, 2013, Sunrain was notified of the discovery of Bacterial Ring Rot in the A84180-8 seed potatoes grown by Silver Creek during the 2012 crop year.

6. The 6,700 cwt of seed potato received by Sunrain and sold to farmers for the 2013 crop year included approximately 5,500 of the A84180-8 variety infected with bacterial ring rot.

7. I was informed by Aron Durbidge, Sunrain's Business Manager, that upon learning of the bacterial ring rot, Sunrain notified the grower who had received the A84180-8 variety seed and informed the grower of the issue.

8. The grower has declined to pay Sunrain for the seed and Sunrain has not received payment for the 5,500 cwt of A84180-8 variety seed.

9. Notwithstanding this lack of payment on the seed, Sunrain has tendered payment and Silver Creek has accepted payment of the full contract price under the Blanket Variety Contract for all 6,700 cwt accepted by Sunrain and delivered to growers.

10. Sunrain has paid full contract price to Silver Creek for all 2012 crop year seed potatoes delivered to Sunrain and sold to growers.

11. After rejecting Silver Creek's 2012 seed potato crop as a result of the bacterial ring rot and after agreeing to help Silver Creek clear its storage of the seed potatoes by selling it as cattle feed, Sunrain delivered a portion of the crop to cattle operations and received payment for those potatoes on behalf of Silver Creek, holding the proceeds from the cattle feed sale for the benefit of Silver Creek.

12. After the potatoes had been delivered to cattle operations, I was informed by Aron Durbidge that Silver Creek refused to accept the cattle feed returns for the rejected seed potatoes unless they were characterized as partial payments.

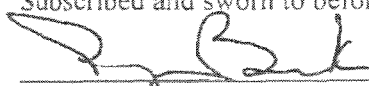
13. Notwithstanding the delivery of infected potatoes by Silver Creek and the rejection of the entire remaining seed crop by Sunrain, Silver Creek demanded that Sunrain pay the full seed potato price.

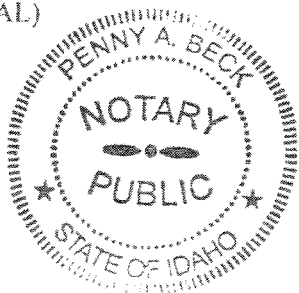
14. Sunrain continues to hold the sale proceeds from the cattle feed sale for the benefit of Silver Creek, but Silver Creek has refused to accept cattle feed prices for the potatoes it agreed to sell as cattle feed.

Date: June 16, 2014

  
\_\_\_\_\_  
Lisa Swenson

Subscribed and sworn to before me on this 16<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: *Idaho Falls*  
My Commission Expires: *3/23/2017*  
(SEAL)



AFFIDAVIT OF LISA SWENSON - 3

**CERTIFICATE OF SERVICE**

I certify I am a licensed attorney in the state of Idaho and on June 16, 2013, I served a true and correct copy of the AFFIDAVIT OF LISA SWENSON on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669



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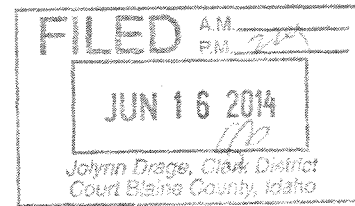


Facsimile

*for*   
Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant



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Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

Case No.: CV-2013-644

MEMORANDUM IN OPPOSITION TO  
AMENDED MOTION FOR PARTIAL  
SUMMARY JUDGMENT

Sunrain Varieties LLC (Sunrain), through its attorneys of record, respectfully submits the following in opposition to Plaintiff's Amended Motion for Partial Summary Judgment and requests that the motion be denied.

**INTRODUCTION**

Plaintiff's request for partial summary judgment must fail. Sunrain and Plaintiff entered into an agreement under which Plaintiff would grow seed potatoes during the 2012 crop year and deliver them to Sunrain for use during the 2013 crop year. After delivery of the first 6,700 cwt of seed potatoes, it was learned that Plaintiff's crop was infected with bacterial ring rot. As a consequence, Sunrain rejected the balance of the

MEMORANDUM IN OPPOSITION TO AMENDED MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 1

seed crop, paid for the 6,700 cwt already received, and offered, as a show of good faith, to help Plaintiff clear the non-marketable seed potatoes from storage. Plaintiff initially agreed, including the sale of the crop as cattle feed, but after a portion of the crop was sold off as feed it demanded full payment under the already rejected seed contract. Plaintiff's motion must fail because the seed potatoes were properly rejected under Idaho Code 28-2-601, because the accepted seed has been paid for under the terms of the contract, and because potatoes sold as feed were sold pursuant to Plaintiff's instructions under Idaho Code 28-2-603.

### STATEMENT OF FACTS

Relevant facts establishing triable issues of fact are set forth in the affidavits of Lisa Swenson and Aron Drubidge filed contemporaneously with this memorandum.

### STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c) (2010); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). It is recognized that when assessing the motion for summary judgment, the court must draw all facts and inferences in favor of the non-moving party. *G&M Farms*, 119 Idaho at 517, 808 P.2d at 854 (1991); *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994); *Haessley v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 825 P.2d 1119 (1992).

The moving party bears the burden of establishing the lack of a genuine issue of material fact. If the moving party fails to make this showing, then summary judgment is inappropriate. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The

non-moving party is entitled to show a genuine issue of material fact regarding the elements challenged by the moving party's motion. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990), citing, *Celotex v. Catrett*, 477 U.S. 317 (1986); see also *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

If reasonable people could reach different conclusions or inferences from the evidence, the motion for summary judgment should be denied. *Thompson v. Pike*, 125 Idaho 897, 900, 876 P.2d 595, 598 (1994); *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

### ARGUMENT

Plaintiff's request for partial summary judgment must fail for several reasons. First, Sunrain was within its rights under the contract to reject the balance of the potatoes after Plaintiff delivered non-conforming potatoes. Second, Sunrain has paid Plaintiff the full contract price for the non-conforming potatoes accepted and sold before notice of the bacterial ring rot issues. Third, all potatoes delivered to Potandon following notice of the bacterial ring rot issues were delivered post rejection under a separate agreement to remove the goods from Plaintiff's farm so he could begin the sanitation process.

**I. Under the UCC, if a seller (Silver Creek) tenders non-conforming goods, the buyer (Sunrain) may accept part and reject the rest.**

Sunrain has no obligation to pay Plaintiff for non-infected potatoes. By its own admission, Plaintiff delivered potatoes with bacterial ring rot, a clear deviation from the terms of the contract. *Johnson Aff.*, ¶¶13, 19 and Exhibit D. As a result, Sunrain was entitled to reject the rest of the potatoes.

The Uniform Commercial Code provides, in pertinent part, "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . (c)

accept any commercial unit or units and reject the rest.” IDAHO CODE ANN. § 28-2-601. Because the potatoes delivered by Plaintiff were infected with bacterial ring rot, Sunrain’s decision to reject the rest of the potatoes after acceptance of two loads was proper.

The plain language of the statute belies Plaintiff’s contention that Sunrain must take delivery and/or pay the contract for those potatoes that remain eligible for certification. The statute clearly provides, “if the goods . . . fail **in any respect** to conform to the contract” then partial acceptance and rejection of the rest is within the buyer’s rights. Indeed, the official comment to this section provides, “Partial acceptance is permitted whether the part of the goods accepted conforms or not.” *Id.*, comment 1.

*G & H Land & Cattle Co. v. Heitzman & Nelson, Inc.*, 102 Idaho 204, 628 P. 2d 1038 (1981) is instructive. Like the present case, G & H Land involved a contract for the sale of potatoes. “Heitzman Produce agreed to purchase from G & H Land & Cattle Company all potatoes to be grown by G & H on its acreage in Jerome County. *G & H Land & Cattle Co. v. Heitzman & Nelson, Inc.*, 102 Idaho 204, 205, 628 P.2d 1038, 1039 (1981). The contract obligation to accept delivery was subject to specific size requirements. *Id.* As harvest began, it appeared the crop did not meet size specifications. *Id.* at 206, 1040. Heitzman took two truck loads from G & H Land and transported them to a processing facility in California where it was determined they undersized potatoes would not be usable, and Heitzman paid G & H Land the contract price for the two loads. *Id.* An additional ten loads were taken to Heitzman’s storage facility where they were inspected by a state potato inspector who determined that 39.2% of the crop met the size requirement of the contract. *Id.* Heitzman then notified G & H Land that it was rejecting

the balance of the crop, but paid for the ten loads transported and subjected to inspection. *Id.* After a meeting of the parties, G & H Land requested a second inspection of 105,000 pounds which was conducted by the state inspector and showed 54% of the potatoes meeting the size requirement. *Id.* Heitzman again communicated its rejection and again paid for the inspected potatoes. *Id.* G & H Land responded to the rejection by bringing suit against Heitzman for breach of contract where the District Court concluded that Heitzman had no obligation to accept any of the potatoes since they did not meet the size specification. *Id.* at 207, 1041.

On appeal, G & H Land argued for the application of the UCC and upon applying the statute the Supreme Court, citing Section 28-2-601 concluded:

These sections provide that the buyer may accept any commercial units to a contract and reject the rest, and that the contract price must be paid for the units accepted. The contract provided for delivery at different times, and inspection at the time of each delivery. The contract being divisible in nature, partial acceptance and partial rejection was a procedure available to the respondent.

*Id.* at 209, 1043. At least 39% and perhaps as much as 54% of the G & H Land crop conformed to the size requirements of the contract, but there was no obligation on the part of Heitzman to accept those conforming potatoes and they properly rejected the balance of the crop even after accepting and paying for 14 non-conforming loads.

The present case is no different. Plaintiff's contention that Sunrain is obligated to pay for the non-infected potatoes is not supported by the law. Indeed, if any party is entitled to summary judgment on this issue, it is Sunrain. The law clearly provides that if the goods fail in any respect to conform to the contract the buyer may accept part and reject the rest. Sunrain has done precisely as provided by Section 28-2-601. *Derbidge Aff.*, ¶ 6. It has no obligation to Plaintiff to take delivery of or pay for the rejected crop.

Sunrain anticipates that Plaintiff may argue under Section 28-2-612 that Sunrain was only entitled to reject non-conforming installments, but the statute does not support that conclusion. "Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole." IDAHO CODE ANN. § 28-2-612. Plaintiff cannot reasonably assert the position that the presence of bacterial ring rot in part of the crop does not impair the value of the whole. Indeed, Plaintiff has asserted the position that Sunrain should have notified Plaintiff that a portion of the seed provided to Plaintiff was grown on a farm where bacterial ring rot was discovered a full year after the seed was harvested there. *Johnson Aff.*, ¶¶ 7-10. If the discovery of bacterial ring rot one year removed from growing seed on a farm is of significance, how much more detrimental to the value of seed must be the discovery of bacterial ring rot in the same crop year, even if a portion of the crop was negative for bacterial ring rot.

Plaintiff tendered non-conforming goods and Sunrain's rejection of the rest of the goods, notwithstanding receipt of a portion of the crop, is consistent with the Uniform Commercial Code. Plaintiff's contention that Sunrain is obligated to pay the contract price for non-infected potatoes is not supported by the law or the facts and Plaintiff has failed to carry its burden on summary judgment to establish the lack of a genuine issue of material fact. Accordingly, its motion for summary judgment must fail.

**II. Under the UCC, a buyer (Sunrain) who has accepted a portion of goods and rejected the rest, is only obligated to the farmer (Silver Creek) for the accepted portion. Sunrain has paid for the accepted potatoes.**

Plaintiff next contends that having accepted delivery of the 6,700 cwt sold to farmers for use in production during the 2013 crop year, Sunrain does not dispute Plaintiff's characterization of the law. As stated in *G & H Land & Cattle*, "[Sections 2-

601, 2-606 and 2-607] provide that the buyer may accept any commercial units to the contract and reject the rest, and that the contract price must be paid for the units accepted." *G & H Land & Cattle*, 102 Idaho at 209, 628 P. 2d at 1043.

What Sunrain does dispute, however, is its alleged failure to pay for the accepted 6,700 cwt. Sunrain maintains that it has paid the full contract price for all seed potatoes accepted under the terms of the contract, including those potatoes for which it was not able to recover payment from its customers because of the existence of bacterial ring rot. *Swenson Aff.*, ¶¶ 4-10. Swenson's testimony that Sunrain has paid the contract sums creates a question of fact and precludes summary judgment. Furthermore, even assuming, arguendo, that Sunrain had not paid for the accepted potatoes, it has a claim against Silver Creek for the incidental and consequential damages caused by its breach of warranty and the harm caused to Sunrain after it delivered infected potatoes to its customers (See IDAHO CODE ANN. § 28-2-715), and should be entitled to offset any claims alleged by Silver Creek.

Because questions of fact regarding payment on the accepted seed potatoes remain, Plaintiff's motion must be denied.

**III. Under the UCC, a sale of rejected perishable goods by a buyer (Sunrain) does not constitute an acceptance when done according to the agreement and instruction of the farmer (Silver Creek).**

Plaintiff next contends that by taking possession of rejected goods in an effort to help Plaintiff clear its storage of the rejected potatoes, Sunrain actually accepted the potatoes under the contract. Plaintiff relies upon the Idaho Supreme Court's holding in *Borges v. Magic Valley Foods*, 101 Idaho 494, 616 P.2d 273 (1980) stating, "Generally, a buyer is deemed to have accepted defective good when, knowing of the defect, he resells goods without notifying seller[.]" *Borges*, 101 Idaho at 496, 616 P.2d at 275. While this

is again a correct statement of the holding and the law, it is, as noted on its face, only generally true. Furthermore, the facts of the present case do not fit the holding.

Specifically, Sunrain had already rejected the seed before taking possession under a separate agreement to help Silver Creek clear its storage and Silver Creek allowed Sunrain to sell the perishable product as cattle feed. *Derbidge Aff.*, ¶¶ 5-15. Sunrain did not take delivery of seed potatoes under the contract. Instead, Sunrain took possession of unsellable potatoes under an agreement and pursuant to instructions from Plaintiff to sell them as cattle feed. The sale does not constitute an acceptance and was not done without notifying Plaintiff.

Section 28-2-603 provides, “when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily.” IDAHO CODE ANN. § 28-2-603(1).

In this case there was no acceptance of the seed potatoes that were sold as cattle feed. Sunrain’s possession and disposition of the potatoes as cattle feed was not an act inconsistent with Plaintiff’s ownership under Section 28-2-606, but an adherence to Sunrain’s duty under Section 28-2-603. Plaintiff did not have a market for the potatoes and instructed Sunrain to sell them as cattle feed. Accordingly, Plaintiff’s request for summary judgment on the question of payment for the rejected cattle feed potatoes must be denied.



**IV. Sunrain has not sought to avoid paying the contract rate for potatoes.**

Plaintiff's final argument is essentially a restatement of its second and third arguments. Plaintiff contends that the Court should rule as a matter of law that Sunrain cannot avoid paying the contract rate for accepted goods. Sunrain again does not dispute Plaintiff's characterization of the law. It is the law in Idaho that a buyer must pay the contract rate for accepted good. *G & H Land & Cattle, supra*. But as noted above there are questions of fact precluding summary judgment. First, Sunrain has paid the contract rate for all accepted potatoes. Second, the potatoes sold as cattle feed were not accepted, but were sold at the instruction of Plaintiff who had no market for the potatoes. Because Sunrain has paid for all accepted goods, summary judgment must be denied.

**CONCLUSION**

For the foregoing reasons, Sunrain respectfully requests a denial of Plaintiff's motion.

Dated: June 16, 2014



Michael D. Gaffney  
of BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I certify I am a licensed attorney in the state of Idaho and on June 16, 2013, I served a true and correct copy of the MEMORANDUM IN OPPOSITION TO AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669

☐

U.S. Mail

☐

Hand-delivered

☒

Facsimile

Blaine County Courthouse  
201 2<sup>nd</sup> Avenue S., Ste 106  
Hailey, ID 83333  
Fax: (208) 788-5527

☐

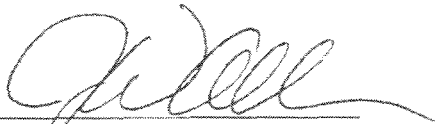
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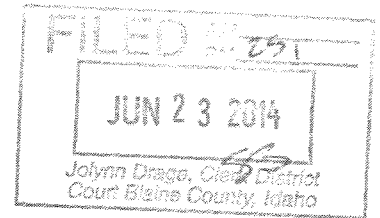
Hand-delivered

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Facsimile

  
\_\_\_\_\_  
Michael D. Gaffney  
Of/Beard St. Clair Gaffney PA  
Attorney for Defendant

Andrew B. Wright [ISB No. 6812]  
 WRIGHT BROTHERS LAW OFFICE, PLLC  
 1166 Eastland Drive North, Suite A  
 P.O. Box 226  
 Twin Falls, ID 83303  
 Telephone No. (208) 733-3107  
 Facsimile No. (208) 733-1669  
 e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
 limited liability company, )  
 )  
 Plaintiff/Counterdefendant, )  
 vs. )  
 )  
 SUNRAIN VARIETIES, LLC, a Delaware )  
 limited liability company, )  
 )  
 Defendant/Counterclaimant. )  
 )

Case No. CV-2013-644

**AFFIDAVIT OF ANDREW B. WRIGHT  
 IN SUPPORT OF REPLY  
 MEMORANDUM IN SUPPORT OF  
 AMENDED MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

STATE OF IDAHO )  
 )ss.  
 County of Twin Falls )

ANDREW B. WRIGHT, being first duly sworn upon oath, deposes and states:


- 1) My name Andrew B. Wright. I am the attorney for Silver Creek Seed, LLC ("Silver Creek").
- 2) I have personal knowledge of the factual information contained herein, and am over the age of 18 years and competent to testify to the facts as stated herein.
- 3) This affidavit is made upon personal knowledge setting forth facts that I believe to be true and would be admissible in evidence.

4) Attached hereto as Exhibit A is an excerpt from the interrogatories we propounded and the responses we received from Defendant/Counterclaimant.

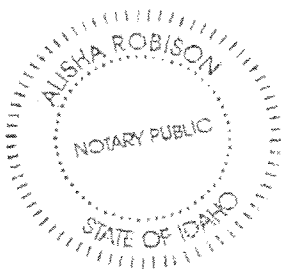
5) Attached hereto as Exhibit B is an excerpt from the requests for admission we propounded and the responses we received from Defendant/Counterclaimant.


Further your affiant sayeth naught.

DATED this 23 day of June, 2014.

  
\_\_\_\_\_  
Andrew B. Wright

SUBSCRIBED and SWORN to before me this 23 day of June, 2014.



  
\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at TWIN Falls  
My Commission Expires: 2-6-18

#### CERTIFICATE OF SERVICE

Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 23 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
☐ Express Mail  
☐ Hand Delivery  
☐ Facsimile- (208) 529-9732  
☒ E-mail

  
\_\_\_\_\_  
Andrew B. Wright

## EXHIBIT A

INTERROGATORY NO. 7: Please describe in detail any and all agreements between Silver Creek and Sunrain. In this description, please include, but do not be limited to, the date the parties entered into each agreement, all material terms of each agreement, and the extent, if any, that any of the agreements were modified by the parties.

RESPONSE:

- Blanket Variety Contract
- Idaho Crop Improvement shipping tags including warranty waivers

INTERROGATORY NO. 8: Please describe in detail the entire factual basis for your contention that the Sunrain Potatoes were not infected with bacterial ring rot when you provided them to Silver Creek.

RESPONSE:

- Idaho Crop Improvement pre-delivery seed certification
- Idaho Crop Improvement pre-delivery ring rot tests

INTERROGATORY NO. 9: Please set forth, in detail for each variety, a full and complete description of the growth, cutting, and sales of the Sunrain Potatoes. The information we seek in this interrogatory includes, but is not limited to: where each generation of the Sunrain Potatoes was planted, the grower of each generation of the Sunrain Potatoes, the individual who cut or processed each generation of the Sunrain Potatoes, the dates and methods of cutting each generation of Sunrain Potatoes, the dates of harvesting each generation of Sunrain Potatoes, the buyer of each generation of Sunrain Potatoes, the date of purchase of each generation of Sunrain Potatoes, the testing,

## EXHIBIT B

REQUEST FOR ADMISSION NO. 2: Admit that you did not pay Silver Creek any amounts pursuant to the Blanket Variety Contract.

RESPONSE: Deny. Sunrain made payments to Silver Creek totaling approximately \$353,000 comprised of \$275,000 in advance deposits for future shipments and approximately \$80,000 paid for actual shipments.

REQUEST FOR ADMISSION NO. 3: Admit that you refused to purchase the Silver Creek Potatoes from Silver Creek.

RESPONSE: Deny. Sunrain purchased approximately 10% of Silver Creek's 2012 crop or 6800 cwt.

REQUEST FOR ADMISSION NO. 4: Admit that, in your sale of the Sunrain Potatoes to Silver Creek, there was an implied warranty of marketability that the Sunrain Potatoes would be free of bacterial ring rot.

RESPONSE: Deny. All warranties were expressly disclaimed by the relevant USDA shipping tags.

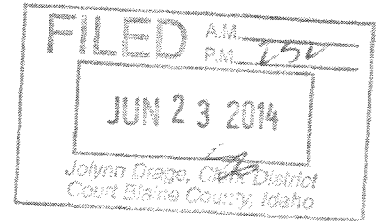
REQUEST FOR ADMISSION NO. 5: Admit that you refused to accept the Silver Creek Potatoes from Silver Creek.

RESPONSE: Deny. Sunrain only refused shipment of Silver Creek potatoes after the bacterial ring rot was discovered. Many of these shipments were already in transit and had to be stopped or diverted to third parties for non-human use, e.g. cattle feed.

REQUEST FOR ADMISSION NO. 6: Admit that, in your sale of the Sunrain Potatoes to Silver Creek, you knew that Silver Creek needed these seed potatoes to be free from bacterial ring rot.



Andrew B. Wright [ISB No. 6812]  
 WRIGHT BROTHERS LAW OFFICE, PLLC  
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 Facsimile No. (208) 733-1669  
 e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho  
 limited liability company,

Plaintiff/Counterdefendant,  
 vs.

SUNRAIN VARIETIES, LLC, a Delaware  
 limited liability company,

Defendant/Counterclaimant.

Case No. CV-2013-644

**MOTION TO STRIKE**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), by and through its attorney Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby submits this *Motion to Strike*.

Silver Creek hereby moves this Court to strike paragraphs 11-14 of the *Affidavit of Lisa Swenson* and paragraphs 6-15 of the *Affidavit of Aron Derbidge* because those paragraphs contain conclusory and unsupported statements that do not meet the requirements of Idaho Rule of Civil Procedure 56(e). This motion is supported by the filings and pleadings in this matter, including without limitation, Section II.3.B of Silver Creek's *Reply Memorandum in Support of Amended Motion for Partial Summary Judgment*, the *Affidavit of Mark Johnson in Support of*

*Motion for Summary Judgment, Affidavit of Mark Johnson in Support of Reply to Sunrain Varieties, LLC's Opposition to Summary Judgment, and the Affidavit of Andrew B. Wright in Support of Reply Memorandum in Support of Amended Motion for Partial Summary Judgment.*

Oral argument is requested.

DATED this 23 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: 

Andrew B. Wright

Attorneys for Plaintiff/Counterdefendant

**CERTIFICATE OF SERVICE**

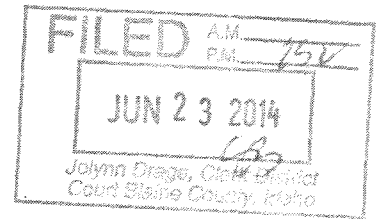
Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 23 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
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Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
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Attorneys for Plaintiff/Counterdefendant

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 limited liability company, )  
 )  
 Plaintiff/Counterdefendant, )  
 vs. )  
 )  
 SUNRAIN VARIETIES, LLC, a Delaware )  
 )  
 Defendant/Counterclaimant. )

Case No. CV-2013-644

**NOTICE OF HEARING**

**(Motion to Strike)**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC, by and through its attorney of record, Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby provide notice that on **June 30, 2014, at 3:00 p.m.** in the District Courtroom at the Blaine County Courthouse, Hailey, Idaho, the Plaintiff/Counterdefendant Silver Creek Seed, LLC's *Motion to Strike* will be heard before the Honorable Robert J. Elgee.

DATED this 23 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: \_\_\_\_\_


Andrew B. Wright  
 Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

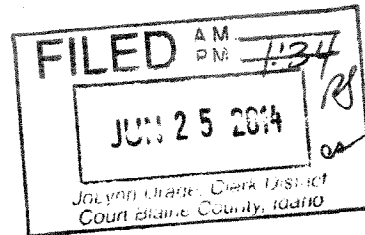
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\_\_\_\_\_  
Andrew B. Wright

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SILVER CREEK SEED, LLC, an Idaho )  
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Plaintiff/Counterdefendant, )  
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SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

Case No. CV-2013-644

**AFFIDAVIT OF MARK JOHNSON  
IN SUPPORT OF REPLY TO SUNRAIN  
VARIETIES, LLC'S OPPOSITION TO  
SUMMARY JUDGMENT**

STATE OF IDAHO )  
 )ss.  
County of Blaine )

MARK JOHNSON, being first duly sworn upon oath, deposes and states:

1) My name is Mark Johnson. I am a member of Silver Creek Seed, LLC ("Silver Creek"). I was Silver Creek's primary contact with Sunrain Varieties, LLC ("Sunrain") concerning the issues in this litigation.

2) I have personal knowledge of the factual information contained herein, and am over the age of 18 years and competent to testify to the facts as stated herein.

AFFIDAVIT OF MARK JOHNSON IN SUPPORT OF REPLY TO SUNRAIN VARIETIES, LLC'S  
OPPOSITION TO SUMMARY JUDGMENT - 1 -

3) This affidavit is made upon personal knowledge setting forth facts that I believe to be true and would be admissible in evidence.

4) On or about March 29, 2013, the 84180 variety grown by Silver Creek tested positive for *Clavibacter michiganensis* subs. *Spedonicus*, which I discussed at that time with Sunrain's employee/agent, Jeff Bragg. I then discussed the potatoes that were the subject of the parties' *Blanket Variety Contract* (the "Sunrain Potatoes"), with Sunrain's employees, Aron Derbidge and Mel Davenport.

5) At no point prior to Sunrain picking up the Sunrain Potatoes and shipping them to third parties for cattle feed, did Jeff Bragg, Aron Derbidge, Mel Davenport, or anyone else from Sunrain inform me that Sunrain rejected or refused to accept any of the seed potatoes grown by Silver Creek pursuant to the parties' *Blanket Variety Contract*. Instead, I discussed with Mr. Bragg that we would test the Sunrain Potatoes with North Dakota State and Agdia, while Mr. Derbidge made the decision of what to do with the Sunrain Potatoes.

6) At no point did Jeff Bragg, Aron Derbidge, Mel Davenport, or anyone else from Sunrain inform me that they were picking up the potatoes "as a show of good faith" or doing it as some type of courtesy to Silver Creek.

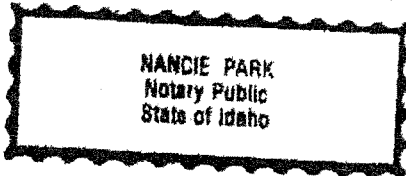
7) I have never told anyone at Sunrain that Silver Creek is entitled to less than the agreed upon price in the parties' *Blanket Variety Contract* or agreed that Silver Creek would accept the cow feed price for the Sunrain Potatoes as payment in full from Silver Creek.

Further your affiant sayeth naught.

DATED this 19 day of June, 2014.

By: Mark Johnson  
Mark Johnson

SUBSCRIBED and SWORN to before me this 19<sup>th</sup> day of June, 2014.



NANCIE PARK  
NOTARY PUBLIC FOR IDAHO  
Residing at PICABO, ID 83419  
My Commission Expires: 7/22/19

#### CERTIFICATE OF SERVICE

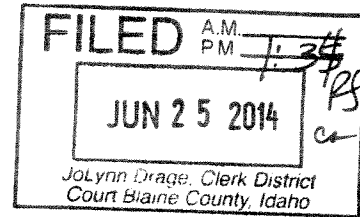
23 Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

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Andrew B. Wright  
Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
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Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )  
 )  
Plaintiff/Counterdefendant, )  
vs. )  
 )  
SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

Case No. CV-2013-644

**REPLY MEMORANDUM IN  
SUPPORT OF AMENDED MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), by and through its attorney Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby submits this *Reply Memorandum in Support of Amended Motion for Partial Summary Judgment*.

**I. OVERVIEW**

Silver Creek's *Amended Motion for Summary Judgment* seeks an order from the Court on the following issues:

- 1) Is Sunrain obligated to pay for the 1<sup>st</sup> Lot, which consisted of the 84180 taken and re-sold by Sunrain prior to the discovery of bacterial ring rot?

REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT



- 2) Is Sunrain obligated to pay for the Non-Infected Potatoes (those potatoes that were free of bacterial ring rot) since they met the requirements of the Contract?
- 3) Is Sunrain obligated to pay for the 2<sup>nd</sup> Lot, which consisted of those potatoes taken and re-sold by Sunrain after the discovery of bacterial ring rot?

The Court's decision could establish Sunrain's liability with regards to any combination of the 1<sup>st</sup> Lot, Non-Infected Potatoes, or 2<sup>nd</sup> Lot. For example, the Court could find Sunrain liable with regards to all three groups of potatoes or could find a question of fact as to Sunrain's liability for the 2<sup>nd</sup> Lot, but still find Sunrain liable for the 1<sup>st</sup> Lot and Non-Infected Potatoes. As such, this memorandum will focus on the applicable law and undisputed facts with regards to each specific group of potatoes.

With regards to the 1<sup>st</sup> Lot, Sunrain essentially admitted in its affidavits that it was liable for the contract price for those potatoes. With regards to the Non-Infected Potatoes, Sunrain did not raise a question of fact, but instead urged a differing legal interpretation of the Uniform Commercial Code. As such, Sunrain's liability for the Non-Infected Potatoes is clearly a question of law for the Court. With regards to the 2<sup>nd</sup> Lot, Sunrain did not raise a differing interpretation of law, but instead attempted to create a question of fact based upon a few conclusory statements. As such, Sunrain's liability for the 2<sup>nd</sup> Lot is dependent upon the Court's determination as to what is an acceptable level of specificity for affidavits submitted in response to a motion for summary judgment.

## II. ANALYSIS

### 1. Sunrain is liable to Silver Creek for the Contract price of the 1<sup>st</sup> Lot.

In Sunrain's *Affidavit of Lisa Swenson* ("Swenson Aff."), Sunrain essentially admitted that it is liable for the 1<sup>st</sup> Lot, but alleges that it has paid Silver Creek in full for the 1<sup>st</sup> Lot. As

such, Silver Creek seeks an order from the Court establishing this liability as a matter of law and the parties will then address the proper application of various Sunrain payments at trial.

**2. Sunrain is liable to Silver Creek for the Contract price of the Non-Infected Potatoes.**

Sunrain is liable to Silver Creek for the Non-Infected Potatoes because 1) there is no dispute that the Non-Infected Potatoes complied with the terms of the Contract, 2) the Contract was an installment contract, 3) an installment contract does not allow a party to reject conforming goods unless the non-conforming goods affect the value of the whole contract, and 4) there is no evidence that the non-conforming goods affected the value of the whole contract.

**A. The Non-Infected Potatoes complied with the terms of the Contract.**

The Contract provided that Sunrain would purchase the Potatoes from Silver Creek and that the Potatoes “shall conform to [ICIA] standards for the generations being delivered to Sunrain,” and must meet the Idaho “certification requirements.” *Johnson Aff.*, ¶11. As explained in Silver Creek’s *Memorandum in Support of Amended Motion for Partial Summary Judgment*, the ICIA rules provide that all contact lots (defined as “a seed lot produced on a farming operation using common production and handling equipment and/or storage facilities”) “shall remain eligible for certification provided an adequate laboratory test is negative for bacterial ring rot prior to final certification.” *Johnson Aff.*, ¶18 at VI.J.4.B.i. (p. 16).

As set forth in the *Johnson Aff.*, subsequent to the discovery of bacterial ring rot in some of the Potatoes, sufficient laboratory testing was done on all of the varieties of the Potatoes grown by Silver Creek in 2012. *Johnson Aff.*, ¶¶15–17. That testing revealed that the majority of the Potatoes were negative for bacterial ring rot, *see id.*, rendering them eligible for certification and in conformance with the quality standards required by the Contract. Sunrain does not dispute this in its *Memorandum in Opposition to Amended Motion for Partial Summary*

*Judgment* ("Memorandum in Opposition"). In fact, Sunrain impliedly agrees that the potatoes that did not test positive for bacterial ring rot remained eligible for certification. See *Memorandum in Opposition*, p. 4. As such, it is undisputed that the Potatoes that did not test positive for bacterial ring rot conformed to the Contract.

**B. The Contract was an installment contract.**

With regards to what constitutes an installment contract, Idaho Code § 28-2-612 provides as follows:

- (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
- (2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
- (3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

The definition of an installment contract provided in the above-described statute is purposely broad and covers situations where the circumstances surrounding the contract involve separate deliveries of the goods subject to the contract. See Idaho Code § 28-2-612 cmt. 1-2; *Autonumerics, Inc. v. Bayer Industries, Inc.*, 696 P.2d 1330, 1334 (Ariz. App. 1st Div. 1984) (citing 2 Anderson, Uniform Commercial Code, (2d Ed) § 2-612:4 at 278) ("The Code employs the term installment with reference to any contract in performance of which the seller may make deliveries in parts or segments. . . . [I]f the contract permits or requires the seller to deliver less

than all of the goods at one time, the contract is to be classified as an installment contract, without regard to the inequality of the several shipments.”)

Courts considering this section of the Uniform Commercial Code (UCC) do not require any specific language in the contract referencing installments in order to find an installment contract. Instead, when it is apparent that the contract is not to be completed at one time, but over time through separate deliveries, an installment contract under the UCC exists. *Allan R. Hackel Org., Inc. v. Am. Radio Sys. Corp.*, 98-0335, 2000 WL 281689 at \*2 (Mass. Super. 2000); *Autonumerics, Inc.*, 696 P.2d at 1335 (contract providing no definite delivery date but anticipating delivery of the goods over a period of time was an installment contract under UCC 2-612). Likewise, when the parties actual performance of a contract takes place over a period of time, that performance reliably indicates that the contract is an installment contract. *Allan R. Hackel Org.*, 2000 WL 281689 at \*2.

In the present case, a review of the Contract’s language and terms, as well as the parties’ performance thereunder, clearly demonstrates that the Contract was an installment contract. The Contract calls for each generation of seed and each seed lot (i.e. a certain generation of a specific variety) to meet the applicable certification requirements. *Johnson Aff.*, ¶11. Further, the Contract requires that each load of the Potatoes will be inspected prior to departure from Silver Creek’s storages to determine whether that load meets the quality requirements. *Johnson Aff.*, ¶11. Likewise, the portion of the Contract dealing with the size requirements for the Potatoes Silver Creek explicitly provides that “Sunrain reserves the right to refuse/reject any loads exceeding 5% on either minimum or maximum sizes.” *Johnson Aff.*, ¶11. These provisions clearly allow and contemplate that each load (i.e., delivery) of the Potatoes requires a separate inspection and may be separately accepted or rejected. The requirement or authorization for

separate delivery, inspection, and acceptance of a portion of goods under a contract are the characteristics of an installment contract for purposes of the UCC.

Similarly, the Contract provides for different rates of payment based on the variety of the seed potatoes, the generation of the seed potatoes, and the field yield for that particular variety and generation. *Johnson Aff.*, ¶11. Thus, each variety, and each generation of a variety, must be separated out and loaded on different trucks in order to determine the price for those Potatoes under the Contract. Likewise, Sunrain was to pay Silver Creek based on the generation and weight of each variety delivered to Sunrain, *Johnson Aff.*, ¶11, which would necessarily involve Sunrain's separate acceptance of each variety and generation of the Potatoes delivered to it. Finally, the Contract provides that upon proof that the seed quality standards were met for a specific variety, Sunrain will make payment will be made after delivery of that specific variety. *Johnson Aff.*, ¶11. As with the other above-mentioned provisions, this term of the Contract contemplates a separate delivery and acceptance of portions of the Potatoes.

Based on all of the foregoing, it is evident that the Contract was an installment contract subject to Idaho Code § 28-2-612.

C. **An installment contract does not allow a party to reject conforming goods unless the non-conforming goods affect the value of the whole contract.**

Sunrain contends that because some of the Potatoes were positive for bacterial ring rot, that it was proper for Sunrain to reject the remainder of the Potatoes. This contention results from an erroneous focus on a single section of the UCC (Idaho Code § 28-2-601) without proper consideration of other applicable sections of the UCC. The Idaho Supreme Court has explained that a single section of the UCC cannot be read in a vacuum, especially when other sections of the UCC deal with the particular issue. *G & H Land & Cattle Co.*, 102 Idaho at 209. Moreover,

Idaho Code § 28-2-601 itself notes that its provisions are subject to the provisions of section 28-2-612, among others. Therefore, focusing solely on section 28-2-601 to justify any rejection of the Non-Infected Potatoes is improper given that the Contract is an installment contract subject to the provisions of section 28-2-612.

The Supreme Court of North Dakota has addressed the same argument that Sunrain is asserting—when the first shipments under a contract were nonconforming, the buyer can accept those shipments and then reject subsequent deliveries under UCC section 2-601, even though the subsequent deliveries did not fail to conform to the contract. *See Merwin v. Ziebarth*, 252 N.W.2d 193, 199 (N.D. 1977). That court held that when UCC section 6-601 is read in conjunction with section 2-612, “it becomes obvious that [the foregoing argument advanced by Sunrain] is not a good argument.” *Id.* This conclusion is clearly the correct understanding of UCC Article 2, because if section 2-601 allows for a buyer to reject any portion of goods subject to a contract whenever there is nonconformity in part of the goods, UCC section 2-612 and its requirements for installment contracts would be meaningless.

The first sentence of Idaho Code § 28-2-601 is clear—when a contract is an installment contract, alleged breaches are governed by Idaho Code § 28-2-612. As explained above, the Contract is an installment contract under Idaho’s adoption of the UCC. Therefore, Silver Creek’s contention that Sunrain is obligated under Idaho Code § 28-2-612 to pay the Contract price for the delivery of Non-Infected Potatoes (i.e. conforming installments) is supported by law.

With regards to *G & H Land & Cattle Co.*, that case is not nearly as instructive as Sunrain asserts because that case differs from the present case in significant respects. First, none of the inspections of potatoes undertaken in *G & H Land & Cattle Co.* found the inspected loads

to conform to the contract requirements. In our case, the Non-Infected Potatoes conformed to the Contract's requirements. Second, the Court in *G & H Land & Cattle Co.* specifically noted that it was considering the issue of whether "partial acceptance of the loads of potatoes precluded subsequent rejection of the *nonconforming potatoes*." 102 Idaho at 209 (emphasis added). In the present case, the alleged subsequent rejection was not of nonconforming potatoes, but of potatoes that conformed to the Contract. It is not apparent from the opinion in *G & H Land & Cattle Co.* if the Court would have come to the same conclusion if the subsequent loads had conformed to the contract.

Finally, the Court in *G & H Land & Cattle Co.* did not consider the effect that Idaho Code § 28-2-612 may have on the buyer's actions in that case. It is quite possible that section 28-2-612 was not mentioned in that case because applying the section would not have changed the Court's holding because all installments of the contract were *nonconforming*. See Idaho Code § 28-2-612(2) (providing that the buyer may reject nonconforming installments). Once again, such a situation is not present in our case. In our case, the Non-Infected Potatoes conformed to the Contract.

As noted above, the factual situation in *G & H Land & Cattle Co.* has important differences from our present case. Accordingly, the applicable UCC provisions (i.e. Idaho Code § 28-2-601 *et al.*) are more appropriate guides for resolution of Silver Creek's *Amended Motion for Partial Summary Judgment* than *G & H Land & Cattle Co.* Application of those statutes to our case refutes Sunrain's arguments. In fact, the North Dakota Supreme Court has aptly commented on the same situation presented by Sunrain's argument. That Court expressed that "[i]t would be incongruous to allow the [buyer] to retain an installment, yet reject future installments because of an alleged defect in the retained installment." *Merwin*, 252 N.W.2d at

199 (analyzing the interplay between UCC sections 2-601 and 2-612). Not only would such allowance defy reason, it would render the UCC provisions for installment contracts meaningless.

**D. There is no evidence that the non-conforming goods affected the value of the whole contract.**

Under Idaho Code section 28-2-612, a buyer cannot reject conforming installments of an installment contract unless nonconformity with respect to one or more installments substantially impairs the value of the whole contract. See Idaho Code § 28-2-612(2) and (3). In Sunrain's Memorandum in Opposition, Sunrain simply assumes that the presence of bacterial ring rot in part of a crop impairs the value of the whole. *Memorandum in Opposition*, p. 6. However, that statement or conclusion was wholly unsupported by any evidence or reasoned argument from Sunrain.

The Idaho Supreme Court has made it clear that "conclusory assertions unsupported by specific facts are insufficient to raise a genuine issue of material fact precluding summary judgment." *Goodman v. Lothrop*, 143 Idaho 622, 627, 151 P.3d 818, 823 (2007). Due to the complete absence of any evidence from Sunrain, there is no way for this Court to evaluate or substantiate Sunrain's claim that the presence of bacterial ring rot in a part of the Potatoes impaired the value of the whole crop. Consequently, there is no genuine issue of material fact presented on this issue.

Thus, the only issue raised by the Memorandum in Opposition for this Court's consideration of whether to grant partial summary judgment is whether installments delivered to Sunrain were conforming or nonconforming. Only if an installment was nonconforming did Sunrain have the right to reject those goods under the UCC. See Idaho Code § 28-2-612(2). Sunrain has admitted that it accepted the nonconforming installments (the 1<sup>st</sup> Lot) and concedes



that the Non-Infected Potatoes conformed to the Contract. Therefore, there is no genuine issue of material fact when Idaho Code § 28-2-612 is applied. Sunrain is liable to Silver Creek for the Contract price of the Non-Infected Potatoes.

**3. Sunrain is liable to Silver Creek for the Contract price of the 2<sup>nd</sup> Lot.**

Sunrain is liable to Silver Creek for the 2<sup>nd</sup> Lot because 1) there is no evidence of facts that would relate to the duty asserted by Sunrain under Idaho Code § 28-2-603, and 2) the conclusory affidavits submitted by Sunrain do not raise a material issue of fact.

**A. There is no evidence of facts that would relate to the duty asserted by Sunrain under Idaho Code § 28-2-603.**

Sunrain's claims that it accepted the 2<sup>nd</sup> Lot to simply adhere to a duty under Idaho Code § 28-2-603 is a misunderstanding of that statute. Section 28-2-603 is implicated when a buyer rejects goods that are "in his possession or control" at the time of rejection. *See Idaho Code* § 28-2-603(1). Clearly, the statute contemplates a situation where the seller ships the goods to the buyer or the buyer takes delivery of the goods and transports them away from the seller, which act is subsequently followed by rejection of the goods. It is in such situations where there would be a need for the buyer to reship, store, sell, or deliver the goods to a third party. *See id.* cmt. 1. If the goods remained with the seller, the seller himself could salvage the goods without the buyer's involvement.

Sunrain's allegations that it rejected the 2<sup>nd</sup> Lot before taking delivery of them would necessarily result in those potatoes remaining in Silver Creek's possession or control because they were located in Silver Creek's storages at that time. In that situation, section 28-2-603 would not apply to Sunrain or the 2<sup>nd</sup> Lot because Sunrain did have possession or control of those potatoes. Therefore, Sunrain had no duty to Silver Creek under section 28-2-603 that would absolve it of its actions with regards to the 2<sup>nd</sup> Lot.

**B. Sunrain's conclusory affidavits do not raise a material issue of fact.**

Sunrain attempts to avoid summary judgment and create an issue of material fact with regards to the 2<sup>nd</sup> Lot by submitting affidavits asserting that, after learning of the positive test for bacterial ring rot, it rejected all of the Potatoes subject to the Contract with the exception of those already received and delivered to third parties. Sunrain also suggests that the potatoes it received and sold as cattle feed was done under a new agreement, separate and apart from the Contract, reached with Silver Creek in an attempt to clear storages of the allegedly rejected potatoes.

Affidavits consisting of conclusory and unsupported facts do not meet the evidentiary requirements of admissibility and competency of evidence mandated by Idaho Rule of Civil Procedure 56(e) for a party to resist a properly supported motion for summary judgment. *State v. Shama Resources Ltd. Partn.*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995). In other words, “conclusory assertions unsupported by specific facts are insufficient to raise a genuine issue of material fact precluding summary judgment.” *Goodman*, 143 Idaho at 627. When faced with affidavits containing conclusory assertions or unsupported facts that are submitted in consideration of a motion for summary judgment, a court may refuse to consider those portions of the affidavits when ruling on the motion. *Hecla Min. Co. v. Star-Morn. Min. Co.*, 122 Idaho 778, 782–86, 839 P.2d 1192, 1196–1200 (1992). The determination of whether to consider such alleged facts is a threshold determination made before applying the liberal construction and reasonable inferences applicable to summary judgment considerations. *Id.* at 784.

Courts applying the foregoing principles have been justified in refusing to consider assertions in affidavits that refer to agreements or conversations that are overly generalized and lack specificity such as specifically when a conversation took place, who was present for the conversation, or who said what during that conversation. *Id.* In the case of an individual that

makes statements about a company he/she represents such as “we participated in negotiations,” “[the company I represent] communicated orally to plaintiffs,” “We agreed,” “based on representations by representatives of plaintiff that . . .,” or “[the opposing company] indicated . . .,” courts are correct to strike such statements because they do not provide the kind of specific, admissible facts necessary to prevent the grant of summary judgment. *Id.* Likewise, when affiants recount conversations without providing that they personally heard the conversation, specifying when such conversations took place, or specifying who was involved in the conversations those portions of the affidavit should be held inadmissible and do not demonstrate a genuine issue of fact requiring trial. *R Homes Corp. v. Herr*, 142 Idaho 87, 93–94, 123 P.3d 720, 726–27 (Idaho App. 2005). Policing of such vague, unsupported, or conclusory statements in affidavits submitted in consideration of summary judgment is critical, otherwise litigants could nearly always prevent summary judgment simply by including such statements in its affidavits.

The affidavits submitted by Sunrain in opposition to Silver Creek’s *Amended Motion for Partial Summary Judgment* contain conclusory and unsupported statements regarding Sunrain’s alleged rejection of the Potatoes. The *Swenson Aff.* simply states, “After rejecting Silver Creek’s 2012 seed potato crop as a result of the bacterial ring rot and after agreeing to help Silver Creek clear its storage of the seed potatoes by selling it as cattle feed, Sunrain . . .” *Swenson Aff.*, ¶11. However, Ms. Swenson does not state any specifics or details about the alleged “rejection,” such as when this rejection took place, who communicated the rejection to Silver Creek, how communication of the rejection to Silver Creek was made, who at Silver Creek received the rejection, etc. Likewise, she does not provide any specifics or details about the supposed agreement with Silver Creek to help clear Silver Creek’s storages by selling the Potatoes as cattle

feed, such as when this agreement was made, which representatives of Silver Creek and Sunrain made the agreement, what role or responsibilities did each entity have in this agreement, etc. There are no specifics in the *Swenson Aff.* to raise a genuine issue of material fact as to whether Sunrain rejected the Potatoes.

Similarly, the *Affidavit of Aron Derbridge* (the "Derbridge Aff.") is also lacking in the necessary specificity regarding the assertions that Sunrain rejected a portion of the seed potatoes and entered into a separate agreement to sell the allegedly rejected potatoes as cattle feed. Mr. Derbridge's affidavit does not provide specifics as to precisely when the rejection and subsequent agreement were made, which persons were involved in such discussions, etc. As with the stricken statements in *Hecla Min. Co.*, Mr. Derbridge simply relies upon uninformative phrases relating to Sunrain and Silver Creek generically such as "Sunrain notified Silver Creek," "Sunrain informed Silver Creek," "A new agreement was reached," "Sunrain made it clear . . . ." *Derbridge Aff.*, ¶¶6-16. These statements are overly general, conclusory, and lack the specificity to show that the affiant is competent to testify to the matters stated in the affidavit. See *Hecla Min. Co.*, 122 Idaho at 785; *Gardner v. Evans*, 110 Idaho 925, 930-32, 719 P.2d 1185, 1190-92 (1986).

In addition to being conclusory and lacking adequate specificity, the *Swenson Aff.* and the *Derbridge Aff.* are directly contrary to the *Affidavit of Mark Johnson in Support of Reply to Sunrain Varieties, LLC's Opposition to Summary Judgment* and the discovery responses Sunrain previously provided to Silver Creek. For example, Silver Creek propounded the following interrogatory and received the following response from Sunrain in discovery:

**INTERROGATORY NO. 7:** Please describe in detail any and all agreements between Silver Creek and Sunrain. In this description, please include, but do not be limited to, the date the parties entered into each agreement, all material terms of each agreement, and the extent, if any, that any of the agreements were modified by the parties.

**RESPONSE:**

- Blanket Variety Contract
- Idaho Crop Improvement shipping tags including warranty waivers

*Affidavit of Andrew B. Wright in Support of Reply Memorandum* (“Wright Aff.”) at ¶4. However, both the *Derbridge Aff.* and the *Swenson Aff.* now assert that there was another agreement between Silver Creek and Sunrain that was separate and apart from those listed in Sunrain’s discovery responses, which related to clearing Silver Creek’s storages and selling the Potatoes as cattle feed. *Derbridge Aff.*, ¶8; *Swenson Aff.*, ¶11.

Further, the *Derbridge Aff.* and *Swenson Aff.* provide that the “agreement” regarding selling the Potatoes as cattle feed was arrived at before Sunrain picked up loads of the potatoes being sent out as cattle feed. *Derbridge Aff.*, ¶8; see *Swenson Aff.*, ¶11. However, Sunrain’s discovery answers provide that the Potatoes were shipped for cattle feed because they were “already in transit” by the time Sunrain discovered bacterial ring rot. Specifically, Sunrain stated as follows:

**REQUEST FOR ADMISSION NO. 5:** Admit that you refused to accept the Silver Creek Potatoes from Silver Creek.

**RESPONSE:** Deny. Sunrain only refused shipment of Silver Creek potatoes after the bacterial ring rot was discovered. Many of these shipments were already in transit and had to be stopped or diverted to third parties for non-human use, e.g. cattle feed.

*Wright Aff.* at ¶5.

After stating that 1) the only agreements between the parties was the Contract and the shipping tags, and 2) the potatoes were sent to cattle feed because they were “in transit” (even though they were sitting in Silver Creek’s cellars), Sunrain would like to Court to accept its conclusory affidavits as evidence to avoid summary judgment with respect to the 2<sup>nd</sup> Lot, which falls short of the requirement of admissibility or competency of facts set forth in affidavits in

order to properly oppose summary judgment. *See Gardner*, 110 Idaho at 930. Moreover, even without being contradictory, the statements in the affidavits regarding rejection of the Potatoes and the cattle feed agreement are simply too generalized, conclusory, and lacking in specificity to be considered by this Court when ruling on the *Amended Motion for Partial Summary Judgment*. Therefore, Silver Creek respectfully requests that this Court refuse to consider those portions of the *Derbridge Aff.* and the *Swenson Aff.* when deciding whether to grant Silver Creek partial summary judgment. When those portions of the affidavits are not considered, there remains no genuine dispute of material fact as to whether Sunrain is liable under the Contract for the 2<sup>nd</sup> Lot.

### III. CONCLUSION

With regards to the 1<sup>st</sup> Lot, Sunrain essentially admitted in its affidavits that it was liable for the Contract price for those potatoes. With regards to the Non-Infected Potatoes, the Uniform Commercial Code provides that Sunrain is liable to pay the Contract price for the Non-Infected Potatoes. With regards to the 2<sup>nd</sup> Lot, Sunrain's conclusory allegations do not create a question of fact that should preclude summary judgment. As such, Silver Creek respectfully requests that the Court find, as a matter of law, that Sunrain is obligated to pay the Contract rate for the 1<sup>st</sup> Lot, Non-Infected Potatoes, and the 2<sup>nd</sup> Lot.

DATED this 23 day of June, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: 


Andrew B. Wright  
Attorneys for Plaintiff/Counterdefendant

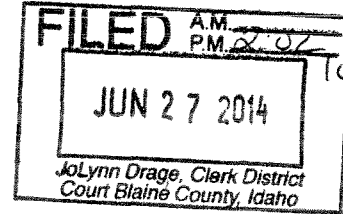
CERTIFICATE OF SERVICE

Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 23 day of June, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

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☐ Express Mail  
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\_\_\_\_\_  
Andrew B. Wright



Michael D. Gaffney, ISB No. 3558  
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Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

Case No.: CV-2013-644

MOTION TO STRIKE AFFIDAVITS OF  
ANDREW B. WRIGHT AND MARK  
JOHNSON AND TO SHORTEN TIME

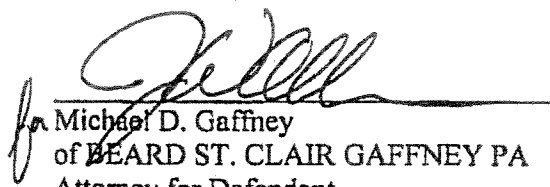
Sunrain Varieties LLC (Sunrain), through its attorneys of record, respectfully moves this Court for an order striking the affidavits of Andrew B. Wright and Mark Johnson submitted in support of the plaintiff's reply to defendant's opposition to plaintiff's motion for partial summary judgment. This motion is made on the grounds the affidavits were not timely filed under the requirements of Rule 56 of the Idaho Rules of Civil Procedure. Oral argument is requested.

Sunrain further moves this Court for an order shortening time for hearing this motion to strike so that it may be heard contemporaneously with the scheduled hearing on the plaintiff's Amended Motion for Partial Summary Judgment.

MOTION TO STRIKE AFFIDAVITS OF ANDREW B. WRIGHT AND MARK  
JOHNSON AND TO SHORTEN TIME - 1



Dated: June 27, 2014

  
for Michael D. Gaffney  
of BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

MOTION TO STRIKE AFFIDAVITS OF ANDREW B. WRIGHT AND MARK  
JOHNSON AND TO SHORTEN TIME - 2

**CERTIFICATE OF SERVICE**

I certify I am a licensed attorney in the state of Idaho and on June 27, 2013, I served a true and correct copy of the MOTION TO STRIKE AFFIDAVITS OF ANDREW B. WRIGHT AND MARK JOHNSON AND TO SHORTEN TIME on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
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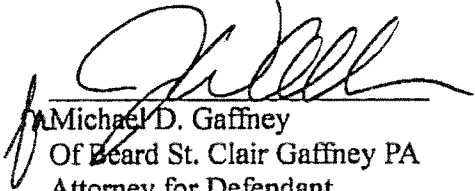
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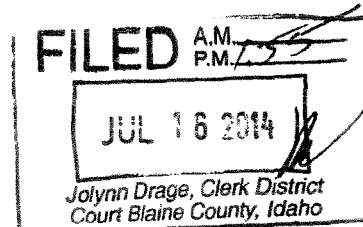
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Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant



Michael D. Gaffney, ISB No. 3558  
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 2105 Coronado Street  
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Attorney for Defendant

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
 BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
 limited liability company,

Plaintiff-Counterclaimant,

vs.

SUNRAIN VARIETIES LLC,

Defendant-Counterdefendent.

Case No.: CV-2013-644

OBJECTION TO ORDER ON  
 PLAINTIFF'S MOTION FOR PARTIAL  
 SUMMARY JUDGMENT

The defendant Sunrain Varieties LLC objects to the proposed order on plaintiff's amended motion for partial summary judgment in its entirety based upon the arguments raised in opposition to the motion for partial summary judgment and the factual issues raised in the affidavits of Aron Derbidge and Lisa Swenson.

The defendant further objects to the proposed order in the following particulars:

1. The Blanket Variety Contract expressly required that a "zero tolerance" standard for acceptance of any of the seed potato lots be applicable and that if any of the seed lots tested positive for bacterial ring rot, the entire crop was deemed to be nonconforming under the Blanket Variety Contract.

2. By failing to deliver a seed potato crop completely free of bacterial ring rot, Silver Creek materially breached and failed to perform its obligations under the Blanket Variety Contract.

3. Under the terms of the Blanket Variety Contract the defendant was justified in rejecting the entire seed potato crop pursuant to the Blanket Variety Contract.

4. The defendant, as stated in the affidavit of Aron Derbidge, expressly rejected the seed potato lots in their entirety. Additionally, the defendant, in refusing to pick up or take delivery of the seed potato lots that did not test positive for bacterial ring rot, expressly rejected said lots.

5. To the extent that the defendant "accepted" the A84180 infected seed lots which were in turn sold to a third party, i.e. Wooton Farms, the defendant paid the plaintiff in full for those seed lots.

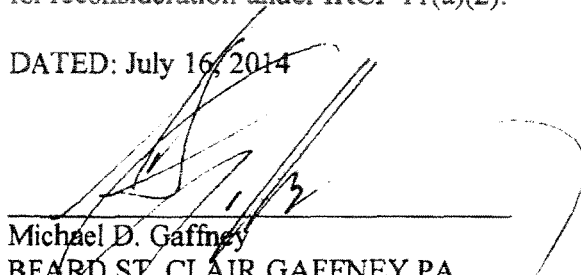
6. As stated in paragraph 4, above, the defendant expressly rejected all seed lots grown under the Blanket Variety Contract.

7. The plaintiff failed to adduce any evidence to support factual finding paragraph 1 of the proposed order.

The defendant further objects to subsections (1) through (4) under the heading "Is Hereby Ordered, Adjudged and Decreed As Follows." The basis for this objection is that the conclusions are not justified by the factual findings and that there are material issues of fact as to whether the defendant rejected the seed potatoes grown under the Blanket Variety Contract. Additionally, the Court held that the plaintiff was paid in full for infected lots sold to third parties, thus subsection 4(c) is an erroneous conclusion based on paragraph 4, above.

Since this order is interlocutory in nature, the defendant reserves the right to move for reconsideration under IRCP 11(a)(2).

DATED: July 16, 2014

  
\_\_\_\_\_  
Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

### CERTIFICATE OF MAILING

I certify I am a licensed attorney in the state of Idaho and on July 16, 2014, I served a true and correct copy of OBJECTION TO ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT on the following by the method of delivery designated below:

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Wright Brothers Law Office  
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Twin Falls, ID 83303  
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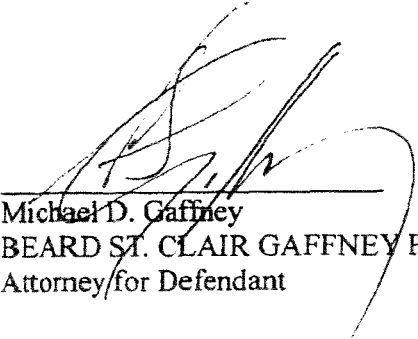
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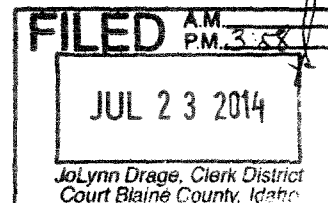
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\_\_\_\_\_  
Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

Michael D. Gaffney, ISB No. 3558  
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2105 Coronado Street  
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Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

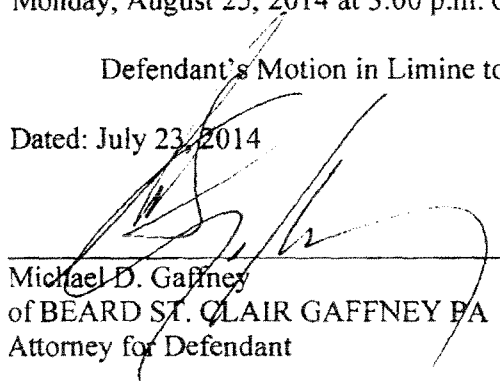
Case No.: CV-2013-644

NOTICE OF HEARING

All parties will please take notice that a hearing has been set before the Honorable  
Robert J. Elgee at the Blaine County Courthouse, 201 2<sup>nd</sup> Avenue South, Hailey, ID, on  
Monday, August 25, 2014 at 3:00 p.m. on the following matters:

Defendant's Motion in Limine to Exclude Jeff Miller Testimony

Dated: July 23, 2014

  
Michael D. Gaffney  
of BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

NOTICE OF HEARING - 1

## CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on June 23, 2013, I served a true and correct copy of the NOTICE OF HEARING on the following by the method of delivery designated below:

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Wright Brothers Law Office  
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Twin Falls, ID 83303  
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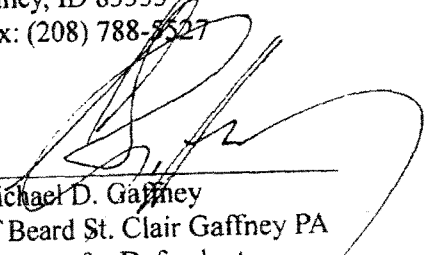
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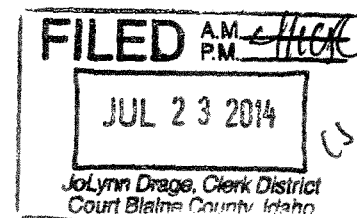
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Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant

NOTICE OF HEARING - 2



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff/Counterdefendant,

vs.

SUNRAIN VARIETIES, LLC, a Delaware  
limited liability company,

Defendant/Counterclaimant.

Case No. CV-2013-644

**ORDER ON PLAINTIFF'S AMENDED  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

The Plaintiff/Counterdefendant Silver Creek Seed, LLC's ("Silver Creek") *Amended Motion for Partial Summary Judgment* having duly and regularly come before the Court, the Court having taken into account the pleadings on file in this case, and the Court having heard oral argument on June 30, 2014, the Court makes the following findings:

- 1) The seed potato lots that did not test positive for *Clavibacter michiganensis* subs. *Spedonicus* (referred to as "bacterial ring rot") conformed to the *Blanket Variety Contract* (the "Contract") between the parties.
- 2) Silver Creek performed its obligations under the Contract with regards to the seed potato lots that did not test positive for bacterial ring rot.
- 3) Defendant/Counterclaimant Sunrain Varieties, LLC ("Sunrain") had a duty to accept the seed potato lots that did not test positive for bacterial ring rot.




- 4) Sunrain did not reject the seed potato lots that did not test positive for bacterial ring rot.
- 5) Sunrain accepted the 84180 lot of seed potatoes that it took delivery of and then sold to a third-party prior to the discovery of bacterial ring rot in those potatoes.
- 6) Sunrain accepted the seed potato lots that did not test positive for bacterial ring rot.

Pursuant to Idaho Rule of Civil Procedure 56(d), the foregoing facts are without substantial controversy and are established for purposes of the remainder of the case. Wherefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- 1) Silver Creek's *Amended Motion for Partial Summary Judgment* is granted with respect to the seed potato lots that did not test positive for bacterial ring rot and the 84180 lot of seed potatoes that Sunrain took delivery of and then sold to a third-party prior to the discovery of bacterial ring rot in those potatoes.
- 2) Sunrain is obligated to pay Silver Creek the rate contained in the Contract for the seed potato lots grown by Silver Creek pursuant to the Contract that did not test positive for bacterial ring rot.
- 3) Sunrain is obligated to pay the rate contained in the Contract for the 84180 lot of seed potatoes that it took delivery of and then sold to a third-party prior to the discovery of bacterial ring rot.
- 4) The facts and issues remaining in controversy are the a) the quantity of the seed potatoes in the lots grown by Silver Creek pursuant to the Contract that did not test positive for bacterial ring rot, b) Silver Creek's damages, c) Sunrain's liability for the seed potato lots that did test positive for bacterial ring rot (excluding the 84180

variety of seed potatoes that did test positive and were sold by Sunrain to a third-party as discussed above), and d) Sunrain's counterclaim.

DATED this 22 day of July, 2014.

By:   
Honorable Robert J. Elgee

**CLERK'S CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 22 day of July, 2014, I caused a true and correct copy of the foregoing *Order on Plaintiff's Amended Motion for Partial Summary Judgment* to be served upon the following persons in the following manner:

Andrew B. Wright  
WRIGHT BROTHERS LAW OFFICE, PLLC  
P.O. Box 226  
Twin Falls, ID 83303-0226

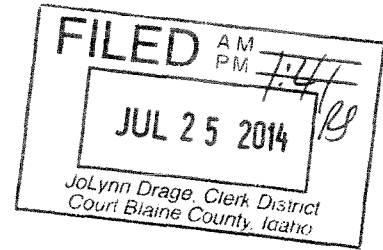
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Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY PA  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

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Clerk

Michael D. Gaffney, ISB No. 3558  
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2105 Coronado Street  
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Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

Case No.: CV-2013-644

AFFIDAVIT OF COUNSEL IN  
SUPPORT OF MOTION TO  
RECONSIDER

STATE OF IDAHO )

)ss.

County of Bonneville)

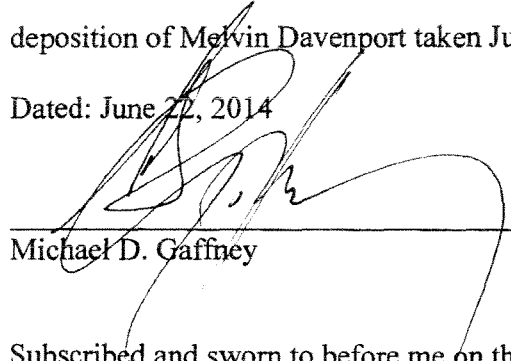
I, Michael D. Gaffney, having been duly sworn on oath, depose and state:

1. I am an attorney with the law firm Beard St. Clair Gaffney PA, and counsel of record for Defendant, Sunrain Varieties LLC, in the above entitled action.
2. I am competent to testify and do so through personal knowledge.
3. Attached as Exhibit A is a true and correct copy of excerpts of the deposition of Mark Alan Johnson taken April 17, 2014.

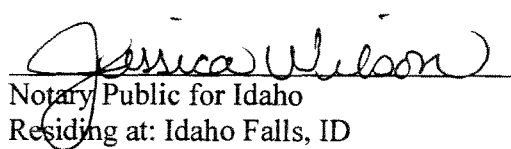
4. Attached as Exhibit B is a true and correct copy of excerpts of the deposition of Aron Derbidge taken July 2, 2014.

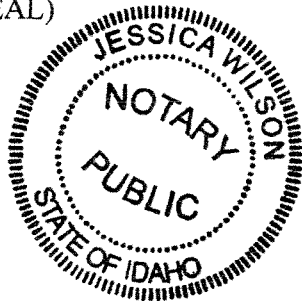
5. Attached as Exhibit C is a true and correct copy of excerpts of the deposition of Melvin Davenport taken July 2, 2014.

Dated: June 22, 2014

  
Michael D. Gaffney

Subscribed and sworn to before me on this 22<sup>nd</sup> day of July 2014.

  
Notary Public for Idaho  
Residing at: Idaho Falls, ID  
My Commission Expires: 9/11/20  
(SEAL)



**CERTIFICATE OF SERVICE**

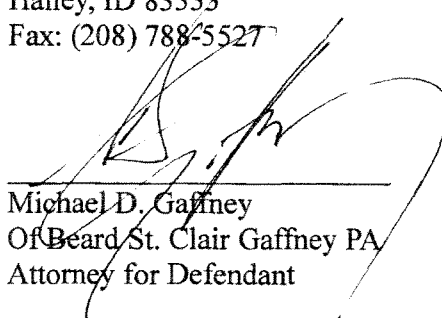
I certify I am a licensed attorney in the state of Idaho and on June 22, 2013, I served a true and correct copy of the AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION TO RECONSIDER on the following by the method of delivery designated below:

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Wright Brothers Law Office  
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Twin Falls, ID 83303  
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\_\_\_\_\_  
Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant

DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY, IDAHO

**COPY**

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )  
Plaintiff-Counterclaimant, )  
vs. )

EXHIBITS PROVIDED  
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Case No. CV-2013-644

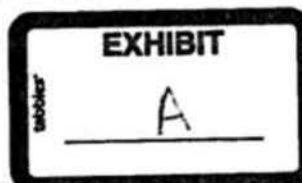
SUNRAIN VARIETIES, LLC, )  
Defendant-Counterdefendant. )  
\_\_\_\_\_ )

RULE 30(b)(6) DEPOSITION OF SILVER CREEK SEED, LLC,  
TESTIMONY OF MARK ALAN JOHNSON  
APRIL 17, 2014

REPORTED BY:

JAHNENE ADMIRE, CSR No. 760,

Notary Public



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Page 6

1 me and, obviously, you can do that.  
2 Where do you currently live?  
3 A. Bellevue.  
4 Q. Bellevue, Idaho?  
5 A. Min-hmm -- yes.  
6 Q. You have to say "yes." And we'll prompt you a  
7 lot because it happens all the time. It's pretty  
8 normal.  
9 Could you tell me, at your residence in  
10 Bellevue, is that a rural or urban setting?  
11 A. Rural.  
12 Q. Okay. Are you involved in some kind of  
13 business?  
14 A. Yes.  
15 Q. Okay. What is that business?  
16 A. Growing seed potatoes.  
17 Q. Are you familiar with an entity called Silver  
18 Creek -- I think it's Silver Creek Seed, LLC?  
19 A. Yes.  
20 Q. Okay. Now, this deposition was noticed up  
21 what we call, I think, it was a 30(b)(6) or a deposition  
22 of actually the LLC itself. So you're not here  
23 personally; you're here on behalf of the LLC. Is it  
24 your understanding that you've been designated to be the  
25 spokesperson for the LLC in this deposition?

Page 7

1 A. Yes.  
2 Q. Okay. Could you describe for me what role  
3 that you have with Silver Creek Seed, LLC?  
4 A. Owner.  
5 Q. Okay. When you say "owner," do you have any  
6 other people that you share an ownership interest with?  
7 A. No.  
8 Q. Silver Creek Seed, LLC, is a limited liability  
9 company. Do you understand what a limited liability  
10 company is?  
11 A. Yes.  
12 Q. Okay. Give me your understanding of what that  
13 kind of business entity is. I know you're not a lawyer,  
14 so I'm not going to hold you to anything.  
15 A. Yeah. It's just an entity that you can start  
16 a business under, that you can be protected from your --  
17 well, I don't know. I don't have a lot of knowledge  
18 about an LLC. I guess it's just the way we set our  
19 company up.  
20 Q. Okay. But it's your understanding that it  
21 affords you some kinds of protections?  
22 A. Yes.  
23 Q. Okay. Do you know how long Sunrain has been  
24 organized as an LLC?  
25 A. Not exactly, no.

Page 8

1 Q. Do you have an approximate number of years?  
2 A. Four, would be --  
3 Q. Did I say "Sunrain"? If I did, I apologize.  
4 I meant Silver Creek.  
5 A. Oh.  
6 Q. It's easy to get the two mixed up.  
7 A. Yeah. We went into business in 2006.  
8 Q. Okay. Before 2006, were you farming in the  
9 same area that you are now?  
10 A. Yes.  
11 Q. Okay. Were you farming under any type of  
12 other business entity at that point?  
13 A. Yes.  
14 Q. What was the name of that business?  
15 A. Cummins Farms, Incorporated.  
16 Q. Cummins? Could you spell that, please?  
17 A. C-u-m-m-i-n-s.  
18 Q. Were you a shareholder in Cummins Farms?  
19 A. No.  
20 Q. How did Cummins Farms become Silver Creek?  
21 A. When Cummins Farms went out of business,  
22 Gerald Bashaw and I purchased the potato cellars and  
23 went into business.  
24 Q. Okay. What was Gerald's last name, again?  
25 A. Bashaw, B-a-s-h-a-w.

Page 9

1 Q. Had you been working for Cummins Farms at that  
2 time?  
3 A. Yeah, previously. Yes, previously.  
4 Q. Okay. What was your job with Cummins Farms?  
5 A. I was a farm manager.  
6 Q. How long did you have that job?  
7 A. Nineteen years.  
8 Q. And before you worked for Cummins Farms as a  
9 farm manager, were you employed?  
10 A. I was in college.  
11 Q. Okay. Where did you go to college?  
12 A. Western Montana and College of Southern Idaho.  
13 Q. Did you complete any degrees?  
14 A. No.  
15 Q. When you were in college, what area did you  
16 concentrate in?  
17 A. Just general studies.  
18 Q. Did you have any coursework in either  
19 agribusiness, agriculture, horticulture, anything of  
20 that nature?  
21 A. Not in college.  
22 Q. Have you ever had any formal education in the  
23 agricultural arts?  
24 A. No.  
25 Q. Okay. Did you grow up on a farm?

Page 10

1 A. My father owned a farm.  
2 Q. Where did he own his farm?  
3 A. Hazelton.  
4 Q. The farm that -- that I assume growing up on  
5 that farm you worked on that farm?  
6 A. Yes.  
7 Q. Okay. When you went to college, did you ever  
8 -- when did you -- when was the last year you attended  
9 college?  
10 A. '87.  
11 Q. Would that have been CSI?  
12 A. Mm-hmm.  
13 Q. Have to say "yes."  
14 A. Yes.  
15 Q. All right. After you finished schooling at  
16 CSI in '87, where did you go to work then?  
17 A. Cummins Farms.  
18 Q. So after you left college, you were at Cummins  
19 Farms until Cummins Farms went out of business, and then  
20 Silver Creek was, I assume, set up. Did it purchase  
21 Cummins Farms? How did that transaction work?  
22 A. Cummins Farms went out of business, and we  
23 started business.  
24 Q. When you say "we," who do you mean "we"?  
25 A. Gerald Bashaw and I.

Page 11

1 Q. Apparently, Mr. Bashaw is not affiliated with  
2 Silver Creek?  
3 A. Not anymore.  
4 Q. Okay. Was he at some point a partner in the  
5 -- or not a partner -- but a member of the LLC?  
6 A. Yes, he was.  
7 Q. Okay. And when did that relationship end?  
8 A. 2011.  
9 Q. Okay.  
10 A. Not positive about that date, but it was right  
11 in there. I don't recall the exact date.  
12 Q. Up until he was no longer associated with  
13 Silver Creek, was he also a member of the LLC?  
14 A. Yes, he was.  
15 Q. Were you 50-50 members?  
16 A. I was 49; he was 51 percent.  
17 Q. Why did Mr. Bashaw leave Silver Creek?  
18 A. Because I offered to buy him out.  
19 Q. And he took that offer?  
20 A. Yes.  
21 Q. All right. Was there age differential between  
22 you and Mr. Bashaw? Were you about the same age? Is he  
23 older?  
24 A. Yeah, there's age differential, yes.  
25 Q. Is he older than you?

Page 12

1 A. Yes.  
2 Q. How much older?  
3 A. Four years.  
4 Q. Was he getting ready to retire? Is that what  
5 happened here?  
6 A. He hasn't retired yet. He has other  
7 businesses.  
8 Q. When you bought Mr. Bashaw out of Silver Creek  
9 Seed, was there a -- was this a cash buyout? How was  
10 the deal structured?  
11 A. Yes, it was a cash buyout.  
12 Q. Was that paid out as a lump sum, or was there  
13 terms associated with that?  
14 A. Lump sum.  
15 Q. How much did you pay him for his 51 percent of  
16 Silver Creek?  
17 A. \$400,000.  
18 Q. Describe, if you would, for me what types of  
19 activities Silver Creek Seed, LLC, engages in currently.  
20 A. We grow seed potatoes.  
21 Q. Any other activities besides growing seed  
22 potatoes?  
23 A. No.  
24 Q. Okay. Has Silver Creek Seed ever been  
25 involved in any business other than growing seed

Page 13

1 potatoes?  
2 A. No.  
3 Q. Okay. How many acres currently does Silver  
4 Creek Seed grow on average in a given growing season?  
5 A. 600.  
6 Q. When you and Mr. Bashaw formed Silver Creek  
7 Seed, was it the same 600 acres that was involved?  
8 A. Slightly less.  
9 Q. Okay. Did Cummins Farms -- how much acreage  
10 did it have when you took it over as the new business?  
11 A. Zero. They went out of business.  
12 Q. Okay. But they did -- did they at some point  
13 own some acreage?  
14 A. Did they own ground?  
15 Q. Ground.  
16 A. Not Picabo.  
17 Q. Okay. How did you obtain the acreage, then,  
18 that Silver Creek Seed owns?  
19 A. The contracts for the acreage?  
20 Q. Well --  
21 A. Silver Creek Seed does not own any land.  
22 Q. That's what I'm trying to get at. So you  
23 farm, roughly, 600 acres --  
24 A. Mm-hmm.  
25 Q. Have to say "yes."



Page 38

Page 40

1 into this agreement that all or some of the seed potato  
2 you'd be growing for Sunrain was going to Canada?

3 A. I don't -- possibly yes. I mean, it wasn't  
4 part of the contract signing that they told me they were  
5 going to Canada. But we make every attempt to make sure  
6 that happens. So I didn't foresee a problem there.

7 Q. Okay. What is your understanding of the term  
8 "phytosanitary"?

9 A. It has to pass requirements to be able to  
10 export, the phytosanitary requirements --

11 Q. Okay. Are these specific --

12 A. -- disease.

13 Q. Okay. Sorry to interrupt you.

14 Is it your understanding that these  
15 requirements are unique to Canada?

16 A. Unique in what way?

17 Q. Have you had other seed crops shipped outside  
18 the United States?

19 A. I have received seed from outside the United  
20 States, but I have not shipped seed.

21 Q. Okay. So this would have been -- regardless  
22 of whether you knew or not whether part or all of this  
23 seed potato crop was going to Canada, you, Silver Creek,  
24 had never, to your knowledge, shipped internationally?

25 A. No, not personally, no. Silver Creek has not

1 that's a zero tolerance?

2 A. That is my understanding. That may not be the  
3 exact. But they have to meet phytosanitary requirements  
4 to import seed into the States because I receive seed  
5 out of there on a regular basis.

6 Q. Do you know, is it your understanding that the  
7 disease tolerance parameters for ring rot are different  
8 for shipping seed potatoes within the United States  
9 versus shipping to Canada? In other words, does the  
10 United States have something less than a zero tolerance  
11 parameter?

12 A. Not to my knowledge. I don't know all the  
13 rules exactly, but, to my knowledge, ring rot is zero  
14 tolerance.

15 Q. Let's go down to paragraph 13 on this  
16 document. This is Warranty and Limitations of  
17 Liability. If you look at triple I, it says, "are fit  
18 for their intended use."

19 What was your understanding of the potatoes  
20 provided to -- the seed potato provided to Silver Creek  
21 in 2012 by Sunrain, what the use of that crop was going  
22 to be once you harvested and sold it back to Sunrain?  
23 What was your understanding where it was going to go,  
24 what it was going to be used for? Did you have any  
25 understanding at all?

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1 shipped internationally.

2 Q. Silver Creek's received seed potato from other  
3 countries, though?

4 A. From Canada, yes.

5 Q. Okay. Any countries other than Canada?

6 A. No.

7 Q. All right.

8 A. Unless it would have been through Sunrain, but  
9 not to my knowledge.

10 Q. Is it your understanding that the Canadians  
11 have different disease tolerance parameters than the  
12 United States? Are you familiar with that in terms of  
13 seed potatoes?

14 A. They're similar. I'm sure they're not exactly  
15 the same as the United States, but they're very similar.

16 Q. Tell me how you came to know this and, as best  
17 you can recall, what the differences are.

18 A. Well, I know they have to make -- meet  
19 phytosanitary requirements to import the seed. So there  
20 can't be any bacterial ring rot, Corky Ringspot  
21 nematode, root-knot nematode. There's -- the United  
22 States has the same qualifications for -- they may not  
23 be identical, but those diseases are zero tolerance.

24 Q. When you say "zero tolerance," the Canadian  
25 requirement for ring rot, is it your understanding that

1 A. Yes, I did.

2 Q. Okay. Tell me what that was.

3 A. They were to be grown for seed potatoes.

4 Q. Okay. By whom?

5 A. Whoever Sunrain sold them to.

6 Q. Anything more specific, or is that pretty much  
7 your understanding of what their intended use was going  
8 to be once you sold the crop?

9 A. That was the intention, for seed potatoes.

10 Q. And as we sit here today, you don't  
11 specifically recall if you knew at the time you entered  
12 into this agreement whether any of that was going to go  
13 international or not? When I say "international,"  
14 probably talking Canada.

15 A. They may have mentioned it, but they didn't  
16 come to me and say we're going to ship these seed to  
17 Canada, that's the only thing we're doing with them.  
18 They may have said we may export some of this. But the  
19 main customer was in Glenns Ferry, which is Wooten  
20 Farms. So they pretty much -- may have got some of the  
21 seed the previous year. So my impression was this 84180  
22 seed was going to go there again. And they may have  
23 even stated that, but I can't recall the exact  
24 conversations.

25 Q. And that brings me to a question I want to ask

1 Q. Do you remember telling that to your lawyer or  
2 providing that information to answer these  
3 interrogatories?

4 A. Yes. Jeff Bragg told me that that farm had  
5 had some -- what? You have a question?

6 Q. I'm going to stop you.

7 A. You want me to finish?

8 Q. Well, the reason I'm stopping you is I want to  
9 do this just in little bits. You remember providing  
10 that answer to us in the discovery; right?

11 A. That Jeff Bragg had told me that the farm that  
12 provided the seed to Sunrain had bacterial ring rot.

13 Q. Okay. That's what I'm trying to get at,  
14 because the answer to the interrogatory is not that  
15 specific. It just says you had information.

16 A. Yes.

17 Q. What I want to do is explore, first of all,  
18 what information you had that a farm from which Sunrain  
19 obtained the infected seed potatoes subsequently tested  
20 positive for bacterial ring rot the following year.  
21 What information did you have?

22 A. The information I had was that Jeff Bragg told  
23 me Ebe Farms, who provided the 84180 seed to Sunrain,  
24 tested positive for bacterial ring rot the following  
25 year, is what he said.

1 Q. What year was he referring to when he said  
2 "the following year"?

3 A. I don't know.

4 Q. Okay. Now --

5 A. He said that.

6 Q. Now, tell me where this -- how this  
7 conversation occurred. Was it face to face?

8 A. Or maybe -- excuse me -- maybe he already knew  
9 they had ring rot on that. I don't know if it was the  
10 following year. But he explained to me that there had  
11 been bacterial ring rot discovered on Ebe Farms. "The  
12 following year," I don't -- because that doesn't sound  
13 correct, because we're talking April here, and I was  
14 talking to him in May. So that doesn't sound right to  
15 me, "the following year." But he did indicate that Ebe  
16 Farms did have bacterial ring rot.

17 Q. Now --

18 A. Does that clarify?

19 Q. Well, I'll try to flesh it out a little bit.  
20 The first question I've got, was this conversation with  
21 Mr. Bragg face to face or some other way?

22 A. We may have talked about it face to face. I  
23 definitely know we talked on the phone. I would think  
24 it was talked about face to face because it was -- this  
25 ring rot was a big issue. And we talked about things

1 with Mel and Aron in our meeting. But I -- that  
2 specific topic, I can't tell you 100 percent.

3 Q. I want to stay focused on Bragg right now.

4 A. Okay.

5 Q. So you don't recall specifically if this was  
6 communicated to you face to face or by phone or some  
7 other way?

8 A. I definitely know it was communicated on the  
9 phone. I remember the conversation like it just  
10 happened.

11 Q. Do you remember getting any texts or emails or  
12 any kind of written communication from Mr. Bragg to the  
13 effect that there had been ring rot on this other farm?

14 A. Not to my knowledge.

15 Q. So this was communicated to you orally, not in  
16 writing?

17 A. At that point, yes.

18 Q. Okay. Now, do you remember when you had this  
19 conversation with Mr. Bragg?

20 A. Immediately after Idaho Crop Improvement  
21 called and told me we had ring rot, I immediately called  
22 Jeff and told him.

23 Q. So you called him, he didn't call you; is  
24 that --

25 A. Correct.

1 Q. Okay. With regard to this specific phone  
2 conversation, did you call on your cell or a landline?

3 A. Cell phone.

4 Q. Tell me what you said to Mr. Bragg in that  
5 phone conversation, as best you can remember today.

6 A. I told him that they discovered bacterial ring  
7 rot in their 84180 variety. And he responded with: I  
8 don't know who authorized those -- that testing, that  
9 seed should have never been tested, Sunrain has some  
10 internal problems, was his response.

11 Q. Okay. Anything else that he said to elaborate  
12 on that other than, quote, internal problems?

13 A. No. At the time I was worried about my  
14 livelihood.

15 Q. Did you have any follow-up conversations that  
16 you remember with Mr. Bragg again where this other farm  
17 was discussed?

18 A. I talked to him several times on the phone. I  
19 don't know how many times that was brought up. At the  
20 time that wasn't the main issue. It was finding out  
21 where it came from and doing our testing, so . . .

22 Q. How did you find out the information? Did you  
23 say "Ebe Farms"? Is that the name you used?

24 A. Yes.

25 Q. Where did you get that information, as to the

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1 A. Yes.  
2 Q. Okay.  
3 A. At the 400 core level. There's been a lot of  
4 debate about this 400 core level since this ring rot  
5 thing has popped up. And they consider that if you test  
6 at 400 cores, there's a 67 percent chance you will not  
7 detect ring rot.  
8 Q. When you say "they," to whom --  
9 A. Anybody. The testing is not sufficient at 400  
10 cores.  
11 (Exhibit 11 marked.)  
12 Q. (BY MR. GAFFNEY) Take a look at Exhibit 11,  
13 which, again, was provided by you, and tell me what this  
14 -- this is basically a spreadsheet. What is it supposed  
15 to be communicating?  
16 A. This is seed that we had to buy because our  
17 seed was unrecertifiable due to the contamination of  
18 ring rot in our lots. We could not plant back our own  
19 seed. So we had to go out and buy new seed.  
20 Q. This is seed that you planted in 2013 in lieu  
21 of Spring Creek seeding?  
22 A. Silver Creek, yes.  
23 Q. Sorry. Spring Creek, it's a golf course down  
24 in Teton Valley.  
25 A. We couldn't recertify our seed, so we had to

1 because that's the only copy I've got.  
2 A. Okay.  
3 Q. The data out here on the left, is that the  
4 date of planting or the date of cutting?  
5 A. I believe that's planted.  
6 Q. Okay. That dates --  
7 A. No, it's not, because this -- this shows we --  
8 is what happened, we hauled these from Carey and put  
9 them in our storages on the 14th. They were cut right  
10 here, where they were cut and planted.  
11 Q. Where it says "Action"?  
12 A. Yeah.  
13 Q. I'm sorry. The dates that you've got out here  
14 on the left, how did you compile those for this? Again,  
15 this is kind of a spreadsheet format. What's the  
16 original source of that information?  
17 A. The scale.  
18 Q. Are there printouts from the scale?  
19 A. I'm sure there is.  
20 Q. Okay. How do you -- in other words, I'm  
21 assuming that you compiled this summary from other  
22 documents?  
23 A. Sure, the scale.  
24 Q. Okay.  
25 A. Yeah.

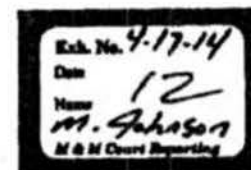
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1 go out and buy all new seed.  
2 Q. And the \$166,000 and change calculation at the  
3 bottom there, in your response to my interrogatory to  
4 you asking for you to list out your damages, you were  
5 claiming \$166,429.80 in damages due to Silver Creek's  
6 inability to recertify its non-Sunrain seed potatoes.  
7 Is that what this spreadsheet quantifies?  
8 A. Yes.  
9 Q. Okay.  
10 (Exhibit 12 marked.)  
11 Q. (BY MR. GAFFNEY) I only got one copy of this.  
12 You guys can share it. I just want you to tell me what  
13 Exhibit 12 was. It was just kind of sitting in there  
14 kind of on its own.  
15 A. This is the sequence that we planted the  
16 seeds, so you could tell that the infected lots were the  
17 last lots that we planted. Otherwise, if we had cut  
18 that infected seed first, our lots would have been  
19 infected. But they weren't. So that just confirms that  
20 the infected lots were the lots that Sunrain provided.  
21 Q. Can you, on the exhibit, mark off what you  
22 referred to as the "infected lots"?  
23 A. (The witness complied.)  
24 Q. Okay. Why don't you put that here so I can  
25 look at it upside down while you're looking at it,

1 Q. And there should be a printout from the scale  
2 to show?  
3 A. Certainly.  
4 Q. Okay. And the ones -- just so the record's  
5 clear, the circled varieties are the ones that  
6 ultimately showed ring rot?  
7 A. Correct. Yes.  
8 Q. All right. And then I guess it also shows  
9 where they were ultimately planted; is that what  
10 "Location" means?  
11 A. Yes.  
12 Q. All right.  
13 (Exhibit 13 marked.)  
14 Q. (BY MR. GAFFNEY) Okay. Let me show you 13,  
15 which is another spreadsheet that you guys provided.  
16 Could you tell me what this spreadsheet signifies?  
17 A. Yes. These are our yields, harvest yields.  
18 Q. For the entire 2012 crop year for Silver  
19 Creek?  
20 A. Looks like this is just Sunrain varieties.  
21 Q. Okay. Can you delineate on this spreadsheet  
22 infected from noninfected?  
23 A. Yeah. It'd be the 84180s and the Rumba.  
24 MR. GAFFNEY: Let me talk to you really quick.  
25 MR. WRIGHT: Okay.

Date	Variety	Generation	From	Action	Location	Lot #
5/11/2012	Laura	G1	SunRain	Cut and planted	Castle	83120016
5/11/2012	Laura	G2	SunRain	Cut and planted	Castle	83120018
5/12/2012	Laura	G2	SunRain	Cut and planted	Castle	83120018
5/12/2012	Annabelle	G1	SunRain		Castle	83120017
5/13/2012	SUNDAY					
5/14/2012	Annabelle	G2	SunRain	Cut and planted	L Springs 3	83120019
05/14/212	Red Fantasy	G1	SunRain	Cut and planted	L Springs 3	83120020
5/14/2012	Red Fantasy	G2	SunRain	Cut and planted	L Springs 3	83120021
5/14/2012	A-84180-8	G3	SunRain	weighed in		83120026
5/14/2012	A-84180-8	G3	SunRain	weighed in		83120026
5/15/2012	Annabelle	G2	SunRain	Cut and planted	L Springs 3	83120022
5/17/2012	Allians	G2	SunRain	Cut and planted	Bingham	83120027
5/17/2012	Carrera	G1	SunRain	Cut and planted	Bingham	83120028
5/18/2012	A-84180-8	G3	SunRain	Cut and planted	Bingham	83120026
5/19/2012	Rumba	G2	SunRain	Cut and planted	Bingham	83120029
5/20/2012	SUNDAY					
5/21/2012	Rumba	G2	SunRain	Cut and planted	Bingham	83120029
5/23/2012	A-84180-8		SunRain	not planted left over	Cellar	83120028
5/24/2012	*****Finished planting*****					
5/25/2012						



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho)  
limited liability company,            ) Case No.  
          Plaintiff/Counterdefendant,) CV-2013-644  
vs.                                        )  
SUNRAIN VARIETIES, LLC, a            )  
Delaware limited liability            )  
company,                                )  
          Defendant/Counterclaimant. )  
\_\_\_\_\_)

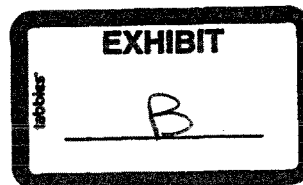
DEPOSITION OF ARON DERBRIDGE

July 2, 2014

REPORTED BY:

JANET FRENCH, CSR NO. 946

Notary Public



<p style="text-align: right;">Page 6</p> <p>1 Q. Okay. And you would have come on board the 2 start of 2012? 3 A. Yes. That's correct. April of 2012 -- 4 April 1st. 5 Q. Okay. And how did Sunrain get involved with 6 Mark Johnson and Silver Creek? 7 A. To be honest with you, I don't know the 8 genesis of it, because it happened prior to my coming 9 on board, but I know Mark is a seed grower, and we 10 needed contracted seed growers to help produce seed 11 for us. 12 Q. And prior to the discovery of ring rot in 13 this case, did you have any concerns with Silver Creek 14 Seed as a seed grower for Sunrain? 15 A. You know, nothing major. We had the minor 16 issues where you would go and feel like maybe the crop 17 had not been quite tended to the way it was, but very 18 open communication between us and Mark. It always had 19 been up until unfortunately he filed suit. But, no, 20 nothing serious. 21 Q. Did you have any concerns with regards to 22 Silver Creek's procedures in harvesting or cutting 23 potatoes or cleanliness, anything along those lines? 24 A. You know, as I mentioned, that is not my 25 area of expertise, so I couldn't tell you whether</p>	<p style="text-align: right;">Page 8</p> <p>1 didn't know. We had never come across this, and to my 2 knowledge, Jeff had never come across this in his 3 previous career, so we didn't know. It was, hey, we 4 have this problem; let's figure out what we need to do 5 about it. 6 Q. Okay. After that conversation with Jeff, 7 when did you next talk to Mark Johnson? 8 A. You know, it wasn't until I got back. And I 9 should have brought the dates to have in front of me. 10 It was that first -- that second week of April that I 11 called and talked to Mark. This was after we had 12 contacted the grower that had already received that 13 seed and talked to them about the fact that we had had 14 a positive ring rot test; it had come from Silver 15 Creek, and Silver Creek had had a positive ring rot 16 test. 17 That's when I called Mark and said, my 18 understanding is that none of that seed can be 19 recertified that was produced on that farm, and so at 20 this moment in time, it is not something that will fit 21 our uses under the contract. It is seed that we will 22 have to reject as certified seed because it cannot be 23 recertified. 24 Q. Okay. That was in a telephone call the 25 second week of April?</p>
<p style="text-align: right;">Page 7</p> <p>1 there were concerns there. That would have fallen 2 under Jeff Bragg at that point in time. 3 Q. Okay. Let's go to the point of time in the 4 discovery of the bacterial ring rot in the 84180s that 5 are the subject of this lawsuit. 6 When did you first know about that? 7 A. Actually, I was on spring break vacation 8 with my family, and I got a panicked phone call from 9 Jeff that we had had a positive test come back on the 10 ELISA testing. So that would have been -- I'm trying 11 to remember. That would have been the first -- right 12 before I got back, so that would have been that first 13 week of April -- somewhere in that time frame, the 14 last week of March, first week of April. 15 Q. Tell me about that conversation with Jeff 16 Bragg. He tells you they tested positive. What was 17 your reaction? What did you tell him to do? 18 A. Well, Jeff and I were peers, and so 19 obviously I wasn't providing direction to Jeff. We 20 were equivalents in the company. Jeff at that point 21 in time also had sales and operations, and I just had 22 the management. 23 We just talked about what the implications 24 were of that, that we were working with Mark to figure 25 out what those were. At that point in time, we just</p>	<p style="text-align: right;">Page 9</p> <p>1 A. Correct. 2 Q. And was anyone else on your end of the line? 3 A. No. No. I believe I was either in my 4 office or in my pickup. It's rare that I've got 5 anybody else in the room while I'm making a phone 6 call. I don't believe there was anybody else on 7 Mark's end either. 8 Q. Do you know if Mark had the phone on 9 conference call? 10 A. I would -- I don't know. He didn't notify 11 me that he did. 12 Q. And what was Mark's reaction to that? 13 A. He understood the concerns. You know, Mark 14 was very open to it. His understanding was the same 15 when we had that conversation that anything that was a 16 generation 2, which is field generation 3, would not 17 be eligible for recertification. That was the 18 original intent for the seed that had been sent to 19 him. The early generation was that he would keep it 20 one more year and grow it out one more year. And, 21 obviously, because of the recertification limitations, 22 that was no longer an option. 23 Q. Okay. And where did you leave it with Mark 24 at that conversation? 25 A. That we were going to have to figure out</p>

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<p>1 what we could do with the crop. So the options we had 2 at that moment in time were to run things fresh. We 3 had the option of talking to a commercial organization 4 to see if they were willing to plant it knowing the 5 background and history of the farm at that point in 6 time, or to take things to cattle. And those really 7 were our three avenues at that point in time. 8 Q. When you say take it to commercial, so this 9 would be sell the seed to a commercial grower who 10 would cut it up, plant the potatoes, and then sell 11 them as -- 12 A. Correct. 13 Q. To be able to do that, don't the seed 14 potatoes have to be certified? 15 A. To -- you know, I'm no expert in the Idaho 16 Crop Improvements Rules, but my understanding was that 17 that was an option. As we talked to these potential 18 growers, there was no level of comfort in doing that. 19 The attitude of all of the processors was that if 20 there was anything above a zero percent in the crop 21 that was going into them, that they would reject the 22 entire lot. So the potential risk to those commercial 23 growers was simply too high. 24 And that's the information that I eventually 25 fed back to Mark. And I believe that was the first</p>	<p>1 pretend to be one, unfortunately, but that's correct. 2 My understanding is no one was willing to take the 3 risk. 4 Q. And did you review the Idaho Crop 5 Improvement Association rules during this time? 6 A. You know, I did, but I, again, wouldn't sit 7 here and tell you that I'm an expert on the ins and 8 outs of them. We have people on staff that are but I 9 am not. 10 Q. Okay. And are you aware that Silver Creek 11 did additional testing on all of their potato lots? 12 A. Yes. 13 Q. Did Sunrain request that additional testing? 14 A. Did we request that additional testing? Not 15 that I can recall, although it is in the contract, and 16 it should have been done anyway per the contract. So 17 I guess we requested the initial testing to be done, 18 but the -- sending it to two separate labs and all of 19 that, no, we didn't -- not that I recall. 20 Q. Okay. And were you aware that the testing 21 for all these Sunrain varieties, with the exception of 22 the Rumba and the 84180 came back negative for 23 bacterial ring rot? 24 A. Well, actually, if you look at the EIB 25 results, they all came back negative, so it really</p>
Page 11	Page 13
<p>1 meeting that Mel was at. And at that point in time, 2 we did go over and sit down with Mark at Silver Creek 3 and talk to him about the fact that we had talked to 4 our commercial growers. No one was willing to receive 5 the seed regardless of what testing had been done at 6 that point because the farm had ring rot. 7 The risk was too high. 8 Q. And do you recall who you talked to or what 9 commercial growers you talked to? 10 A. Oh, my goodness. It would have been growers 11 associated with those varieties, so it would have been 12 Driscoll Brothers, Walters Produce -- at that point in 13 time, I have to be honest, my relationships with all 14 those guys was not very strong, so it would have been 15 a combination of Jeff and Mel making those calls. But 16 the feedback that we got back was that they were not 17 willing to take that seed. 18 Q. Okay. So is it your understanding that the 19 reason that it didn't go to commercial growers wasn't 20 because it was uncertifiable. It was you didn't have 21 a commercial grower that wanted to take them; is that 22 fair? 23 A. I can't speak to the certification portion 24 of it. We would have to talk to somebody that is an 25 expert in what Idaho crops rules are, and I won't</p>	<p>1 depends on what you are looking at, and that's one of 2 the reasons in my understanding in talking with the 3 USDA why they don't recognize the PCR standard is 4 because it is subjective test. It depends on the 5 primer that is used. There is too much variability in 6 it. That is why the ELISA is the recognized standard 7 from the USDA. But, yes, absolutely. Mark provided 8 those test results to us. 9 Again, like I say, we got different answers 10 depending on who performed that test. The ELISA test 11 was redone to verify that. We did request that to be 12 redone just to make sure that we really did have a 13 positive. It did come back positive on the 84180 14 again. 15 Q. It is your understanding that the ELISA test 16 is more accurate than the PCR testing? 17 A. I wouldn't say more accurate, because I 18 can't -- again, I can't speak to that. We have got 19 experts that help guide you and I through that since 20 neither one of us in an expert in that. But my 21 understanding is that's why it is the only recognized 22 standard utilized by the USDA. The PCR is not 23 recognized by the USDA. 24 Q. And does Sunrain do PCR testing now? 25 A. Yes, we do. And we do ELISA as well. We</p>

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1 commercial growers don't have a seed storage to be  
2 able to put things into, and so they cut and plant  
3 right away. In order for us as a company to feel good  
4 about shipping customer seed, we have to know that  
5 they are not going to put the seed into a storage that  
6 has been treated with sprout net. If we do that and  
7 they don't get a crop, that is bad on us as well as it  
8 is on them. And so it would be later in the season  
9 that anything in this area gets shipped out.  
10 Q. Okay. So we had the second week of April.  
11 You had the telephone call with Mark Johnson. Then  
12 you had a meeting with Mark and -- Mel; is that  
13 correct?  
14 A. Yep. Mark, Mel, and Jeff. And we were over  
15 in Mark's office actually.  
16 Q. Okay.  
17 A. His secretary Nancy was there. I don't  
18 believe at the initial meeting that his wife was  
19 there. She was in subsequent meetings, but I don't  
20 believe she was in this one.  
21 Q. And do you know the date of that meeting?  
22 A. I got it written down.  
23 Q. Could that have been April 24th?  
24 A. It could be.  
25 Q. That would be April 24th of 2013. Okay.

Page 23

1 Tell me what was discussed at that meeting.  
2 A. So we discussed where we were in the process  
3 of trying to find commercial growers that would be  
4 willing to accept the seed. And at that point, the  
5 conversation was had again, these don't meet our  
6 needs. Under the contract these won't meet our needs.  
7 We can't recertify. We can't sell them as certified  
8 seed because we've got a ring rot problem. The whole  
9 farm now has a black eye; now what do we do?  
10 So the discussions at that point went to,  
11 can we potentially run these as fresh potatoes through  
12 one of the Potandon network of packing sheds? That's  
13 where we were trying to move some of crop through is  
14 through those channels. It doesn't mean that we  
15 abandoned looking for seed homes for this, but at  
16 every turn we were met with the same response. And as  
17 soon as you disclosed that it came from a ring rot  
18 farm, it was just too substantial of a risk for the  
19 commercial grower to take on.  
20 Q. In that meeting on April 24, 2013, did you  
21 specifically tell Mark Johnson that Sunrain was  
22 rejecting the seed?  
23 A. Yes. Yes, as seed. And then we would work  
24 with him to figure out how we could get it moved out.  
25 We deal in a product that doesn't get any better the

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1 longer it sits in the storage, so you have to get it  
2 moved out on the storages, and that's what we were  
3 attempting to do was to help Mark get the product  
4 moved.  
5 Q. And it is your recollection that you  
6 specifically remember in that meeting telling Mark,  
7 look we reject your seed as seed, but we'll try to  
8 help you --  
9 A. Yes, absolutely. We cannot use this as  
10 seed, and we will try to get it moved out from your  
11 cellars.  
12 Q. And why were you trying to get it moved out  
13 of his cellars?  
14 A. Because the longer you let it sit there, the  
15 more likely it is to just rot. And at that point, you  
16 got to go in there with front end loaders. Mark would  
17 have a whole big mess on his plate. We were trying to  
18 help out somebody that was a seed grower for us.  
19 Q. And was it your understanding that once you  
20 had rejected the seed, it was no longer your  
21 responsibility of what happened in Mark's cellar?  
22 A. Yeah. But that doesn't mean we wanted to  
23 leave him on his own. We were still trying to help  
24 Mark out.  
25 Q. Okay. What else was discussed at this April

Page 25

1 24th meeting?  
2 A. Let's see. We talked about the retesting  
3 that was under way. I don't believe that he had all  
4 the results in at that point in time. He had his crew  
5 out there doing sampling. We talked a little bit  
6 about that, about whether we needed to get a third  
7 party in to pull those samples or if it was kosher  
8 having his crew doing it. We talked about the  
9 differences between ELISA and NPCR, those kinds of  
10 things, and, again, it got to a technical level that  
11 went above my head. Those were the types of things we  
12 discussed.  
13 We discussed grabbing small samples to take  
14 into these packing sheds to have them take a look at  
15 the quality. They do what is called a dockside, so we  
16 bring in 100 to 200 pounds worth of potatoes. They  
17 wash them real quick and take a look at them and see  
18 whether or not they think that it will actually pack.  
19 The difficulty that you have in running  
20 things through a fresh shed is that the running costs  
21 are to a certain level, so if you don't pack out above  
22 approximately 60 percent, it costs you more to put the  
23 potatoes through the packing shed than you get from  
24 the potatoes in the back end. And so that's the  
25 purpose for the dockside, and that's when we started



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1 that process of collecting those samples to take over  
2 to the sheds. I don't recall which sheds they went  
3 to, but I know that that happened.  
4 Q. And at that April 24th meeting, did you  
5 specifically tell Mark that Sunrain was not going to  
6 pay the contract price for the potatoes?  
7 A. I don't recall whether we had a discussion  
8 on the price of the potatoes. We talked about the  
9 fact that we already had paid a down payment. We  
10 didn't talk in specifics about pricing at that  
11 meeting. We did in subsequent meetings, but not in  
12 that one.  
13 Q. Okay. And did you have an agreement as far  
14 as if some of the commercial growers would have taken  
15 some of these potatoes, who would get paid what?  
16 A. No. We didn't get into specifics. We  
17 really didn't. At that point in time, we got the  
18 answer "no" so many times to be honest we didn't  
19 expect to hear "yes" from anybody, and we never did.  
20 Q. Okay. And tell me about your next meeting  
21 with Mark.  
22 A. So that would have been -- that was in May.  
23 Q. Or April 24th?  
24 A. No. You are talking subsequent to that.  
25 Q. The next meeting would have been in May?

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1 A. Yeah.  
2 Q. Okay.  
3 A. Did you want to continue to talk about the  
4 24th? I don't want to move on before you are  
5 comfortable.  
6 Q. No. Let's go to May.  
7 A. All right. So in May, we went back over.  
8 That was Mel and myself. I believe it was Jeff again.  
9 This time it would have been Mark and Nancy and his  
10 wife -- whose name is escaping me right now -- Robin.  
11 Q. Jill?  
12 A. Jill. Thank you. I'm not sure where I got  
13 Robin out of Jill.  
14 Q. And tell me was this over at Silver Creek --  
15 A. This is also over at Silver Creek. This is  
16 where we got into more specifics on numbers. And so  
17 by this point in time, we had recognized by and large  
18 the seed lots would not run fresh. Within the  
19 contract that we had with Silver Creek -- and we had  
20 the same with other seed growers -- we stipulate that  
21 they need to produce as fresh quality. The reason we  
22 do that is because the historical seed growers aren't  
23 concerned about the visual appearance of the potatoes.  
24 There is two issues with that. Number one is the one  
25 that we ran into with Mark, which is if you have seed

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1 that can't be used for seed, for whatever reason, you  
2 want to have an avenue where you can take it to a  
3 fresh shed and pack it and at least recover some cost  
4 out of it.  
5 The second issue is if you skin a potato, if  
6 you bruise a potato, which is very common in most seed  
7 growing operations -- they are concerned about that --  
8 it impacts the performance, especially of these thin  
9 skinned varieties in the following year when the  
10 customer then receives them. It impacts the yield  
11 that they have, the quality that they have. It makes  
12 them more susceptible to all the diseases that  
13 potatoes are faced with. So that is the reason we  
14 have that contract clause in there.  
15 Unfortunately, the crop that Mark produced  
16 didn't meet that. When we did the docksides, we  
17 actually even took a load or two of -- at least one  
18 variety, if not two, that we thought might make it  
19 into sheds and the pack out was terrible. And it  
20 really was those things. It's -- sprouting which  
21 actually is a good thing for seed potatoes, but it was  
22 also the skinning and the bruising, and it was just in  
23 the way that they were harvested and the way that they  
24 were handled.  
25 So we talked about that. We talked about

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1 that issue at that point in time with Mark and then  
2 likely the home for the remaining stock would have to  
3 be cattle feed. Seed potatoes are stored too cold to  
4 keep the sugars ripe for any type of processing  
5 activity. We attempted to go down that route, but the  
6 sugars just weren't right in order to be able to do  
7 that, so really cattle feed ended up being the last  
8 option.  
9 That's when we went in with Mark, and we did  
10 start talking more about how can we work through this  
11 and make it so that you can continue to do business --  
12 so that both of us can continue to do business. So we  
13 started talking settlement numbers trying to get this  
14 resolved to put behind us.  
15 Q. Okay. Backing up a second. So was the  
16 reason that the potatoes were not sent to the  
17 commercial grower issues dealing with the size and the  
18 skin, or was it dealing with the certifiability of the  
19 potatoes?  
20 A. The risks to the commercial grower. Again,  
21 as I mentioned, the environment, the potential risk  
22 that -- the potential risk of exposure to BRR was not  
23 acceptable to the commercial growers. They simply  
24 weren't willing to do it.  
25 Q. Did any of the commercial growers raise

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<p>1 certifiability issues?</p> <p>2 A. Again, I didn't have firsthand conversations</p> <p>3 with them, so I'm not certain. But we can figure out</p> <p>4 with somebody that is smarter than I am what the</p> <p>5 certification requirements were and what impacts there</p> <p>6 were there.</p> <p>7 Now, any of the early generation stuff, that</p> <p>8 certification requirement was ours, and that was an</p> <p>9 issue with us. If we couldn't recertify that seed,</p> <p>10 that seed was of zero value to us. That was the whole</p> <p>11 purpose for growing it was to be able to then</p> <p>12 recertify and have a larger volume the following year.</p> <p>13 So all of those early generation lots were</p> <p>14 absolutely no value to us and that was completely</p> <p>15 clear from the get-go -- once we knew that we had this</p> <p>16 issue and could not recertify them. That was clear</p> <p>17 from day one.</p> <p>18 Q. Early generation -- would that be the second</p> <p>19 generation --</p> <p>20 A. Correct, G2; field year three. So Mark</p> <p>21 planted stock which was field year two, which is</p> <p>22 Idaho's G1. The intention of Sunrain was to replant</p> <p>23 all that material back and then sell it commercially</p> <p>24 as G3 or field year four. You can't do that as soon</p> <p>25 as there is a ring rot find on a farm.</p>	<p>1 A. I know Jeff did, but I did not personally.</p> <p>2 Q. And do you know what his -- the response</p> <p>3 that he got to that?</p> <p>4 A. You know, as far as I recall, it wasn't an</p> <p>5 option, but I don't know.</p> <p>6 Q. And do you know if Sunrain has received</p> <p>7 certification for non-infected lots that came from a</p> <p>8 farm with a lot that had a bacterial ring rot? Have</p> <p>9 you done that in the past?</p> <p>10 A. How do you mean? I'm lost on the question</p> <p>11 there.</p> <p>12 Q. Has Sunrain -- well, let me ask you</p> <p>13 specifically here. Do you know Chris Karren?</p> <p>14 A. I do.</p> <p>15 Q. And are you aware of -- has Chris Karren had</p> <p>16 any issues with bacterial ring rot?</p> <p>17 A. We did have a finding this year in a storage</p> <p>18 that his lot was in.</p> <p>19 Q. And was that in a lot that Sunrain received</p> <p>20 from Chris Karren?</p> <p>21 A. Actually, we never received it from Chris</p> <p>22 Karren. It was still owned by Chris Karren.</p> <p>23 Q. Okay. And where was it being stored?</p> <p>24 A. I've not actually been to the storage, so</p> <p>25 I'm not certain that I could tell you. It was a</p>
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<p>1 Q. Okay. What about the G3s that Mark grew?</p> <p>2 Was Sunrain intending to plant those back again?</p> <p>3 A. No. No. Those were all intended to be sold</p> <p>4 as commercial. So we had the two lots that were</p> <p>5 infected. We had the Rumba and 84180 that couldn't be</p> <p>6 sold period. We just couldn't move those off the</p> <p>7 farm. They had bacterial ring rot. So even to a</p> <p>8 commercial grower, they couldn't have been received.</p> <p>9 The remaining lots that were G3, that was</p> <p>10 our intention to sell those commercially. Again,</p> <p>11 because of the potential risk of exposure, that was no</p> <p>12 longer an option.</p> <p>13 Q. Would you have replanted the -- any of the</p> <p>14 third generation potatoes back again?</p> <p>15 A. You know, we do that periodically, but by</p> <p>16 and large as a business practice, we try not to. The</p> <p>17 further down the generation chain you go, typically</p> <p>18 the weaker the seed is that you sell to your</p> <p>19 commercial customer, so we try to stay away from that.</p> <p>20 We try to move everything commercial at that field</p> <p>21 year four or G3 stage.</p> <p>22 Q. Did you consult with anyone at the Idaho</p> <p>23 Crop Improvement Association or any other experts to</p> <p>24 address the issue of whether the G3s could be</p> <p>25 certified as --</p>	<p>1 third-party seller. I don't know the exact location</p> <p>2 of it.</p> <p>3 Q. And what did the ring rot -- when did it</p> <p>4 become discovered?</p> <p>5 A. It came to our knowledge through his testing</p> <p>6 this spring.</p> <p>7 Q. Okay.</p> <p>8 A. Or maybe -- you know, I could be wrong on</p> <p>9 timing. But it was told to us through his testing.</p> <p>10 Q. Okay. And this would have been potatoes</p> <p>11 that Chris Karren grew in the 2013 growing season?</p> <p>12 A. Correct.</p> <p>13 Q. Okay. Did Sunrain buy any other potatoes</p> <p>14 besides the Mariettes from Chris Karren that came from</p> <p>15 his 2013 growing season?</p> <p>16 A. We did. And we did not buy the Mariettes.</p> <p>17 We did not buy those.</p> <p>18 Q. And so here is my question: You were able</p> <p>19 to buy the non-infected Mariettes from Chris Karren in</p> <p>20 2013?</p> <p>21 A. Uh-huh.</p> <p>22 Q. Is that "yes"?</p> <p>23 A. Yes.</p> <p>24 Q. Did you do special testing for those non</p> <p>25 infected potatoes from Chris Karren?</p>

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1 A. We required the testing from all lots from  
2 all of our growers. So it wasn't special testing. It  
3 is now standard procedure because of the impact we  
4 have had from Silver Creek.  
5 Q. And what testing did you do on those  
6 potatoes from Chris Karren?  
7 A. We did PCR as well as ELISA.  
8 Q. And were you able to certify the potatoes  
9 from Chris Karren as seed potatoes?  
10 A. Yes.  
11 Q. So why couldn't you have done the same thing  
12 with Mark Johnson's seed potatoes?  
13 A. So my understanding -- and, again, you keep  
14 asking me to stand up and talk about Idaho Crop  
15 Improvement's rules, and I couldn't tell you. The  
16 positive test that came back from Mark Johnson came  
17 back from Idaho Crop Improvement, and they are the  
18 ones that branded the farm. It was nothing that  
19 Sunrain had to do. They were the ones that impacted  
20 the certification requirements on the remaining lots.  
21 So I can't tell you what rule it is that they stand on  
22 to be able to do that. I can't tell you anything of  
23 those other things, other than the fact that's where  
24 it is driven from.  
25 Q. And I guess my question will be, well, did

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1 you try to get them certified?  
2 A. Did I try to get what certified?  
3 Q. Did you try to get Mark Johnson's  
4 non-infected potatoes certified?  
5 A. The only time you do certification is at  
6 shipping, so you do the initial certification  
7 paperwork at planting, and then when you ship them  
8 out, you would have an inspector come out. So the  
9 ones that we shipped out prior to the finding, yes,  
10 those were certified. After that, nothing went as  
11 seed.  
12 Q. And on your -- I won't beat a dead horse  
13 here, but just so I'm clear. You didn't take any  
14 steps to see if that would be certifiable or not?  
15 A. I know there were discussions that happened  
16 with Idaho Crop Improvement with both Mark and with  
17 Jeff, but I didn't personally have any involvement in  
18 that.  
19 Q. Okay. And did Sunrain have any problems or  
20 issues certifying the non-infected potatoes from Chris  
21 Karren?  
22 A. We did not. The positive test results did  
23 not come out of Idaho Crop Improvement, so there was  
24 no branding put on the farm.  
25 Q. So where did the -- where did the

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1 Mariette -- is it Mariettes?  
2 A. It is Mariettes.  
3 Q. Mariettes. Where did they test positive?  
4 A. NDSU, and then I can't remember who we did  
5 the ELISA test with. It possibly was Western Labs,  
6 but NDSU did the PCR test. That one I know for a  
7 fact. I had to pay that bill, so I know where that  
8 one came from.  
9 Q. And the potatoes were in Idaho when they got  
10 tested?  
11 A. I don't know where the storage is. I really  
12 don't. Chris Karren grows both in Idaho and in Utah,  
13 so I don't know where the storage was located.  
14 Q. And is the Idaho Crop Improvement  
15 Association aware of that positive test?  
16 A. There is no reporting requirements, so, no.  
17 Q. Okay. All right. Back to this May -- was  
18 the meeting in May -- was that May 10, 2013? Does  
19 that sound right?  
20 A. It could be.  
21 Q. Okay. Anything else discussed at that  
22 meeting that we haven't talked about?  
23 A. We discussed, like I say, potential  
24 settlement. At that point in time, Mark was trying to  
25 mull it over and see what would work with him, what

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1 would work with us. The approach that we took there  
2 is that there was absolutely no way in terms of  
3 certainty to identify where the ring rot came from,  
4 and so our opinion was whatever we could do to help  
5 Mark continue growing as a seed grower, that's what we  
6 wanted to do.  
7 Q. Okay. And who made the decision to send the  
8 potatoes to cow chow?  
9 A. I did.  
10 Q. And was there an agreement as to what was  
11 going to happen with the money from the cow chow?  
12 A. There was a tentative agreement. So Mark  
13 and I had talked about that as part of the potential  
14 settlement, that anything recovered from that would go  
15 back to Mark. We had one last meeting with Mark, and  
16 you probably know the date better than I do. It was  
17 at the gas station just down street from his facility.  
18 At that point in time, Mark made it very clear that  
19 there would be no further discussions about  
20 negotiation unless there was full payment and that he  
21 would be -- that he had already contacted you and  
22 would be pursuing legal action. So at that point all  
23 negotiations stopped.  
24 Q. And on the third meeting -- would that have  
25 also been in May?

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1 A. Probably. For some reason the 24th comes to  
2 mind, but --  
3 Q. Okay. Anything else discussed at that May  
4 24th meeting?  
5 A. No. That was a pretty quick one. Once he  
6 told us that he was done talking to us and was going  
7 to file suit, there wasn't much reason to hang out and  
8 chitchat.  
9 Q. And have you talked to Mark since that date?  
10 A. Let's see. He and I traded a few text  
11 messages as we were moving things out for cattle feed  
12 and finishing cleaning up the storage. So Mark and I  
13 actually did the cattle feed in conjunction. He had  
14 an individual that came in and took product for cattle  
15 feed as well, that was local. When that filled up,  
16 that is when we were pulling it out to a more long  
17 distance -- just -- at the time the rationale was that  
18 we would have a higher return -- a higher potential  
19 return back to Mark by having it done locally.  
20 Where those proceeds went, what the  
21 quantities of those are, I don't know. Again,  
22 negotiations deteriorated at that last meeting, so I  
23 don't know how much Mark received or how that  
24 transpired. I don't know.  
25 Q. And before Mark sent any of the potatoes to

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1 cow chow, did he ask your permission to do that?  
2 A. You know, I don't think so. We were both on  
3 the same page that that was the only place they could  
4 go, so I don't recall granting permission on moving  
5 things out.  
6 At the very last moment, we thought we  
7 potentially had a commercial grower talked into taking  
8 some of Mark's seed and that fell through and that may  
9 have been the only time that he and I talked about  
10 permission. I was trying to get him a higher return  
11 if we could move some of it as seed and unfortunately  
12 it was the same answer as we had previously of it is  
13 just not worth the risk to the rest of my farm so I  
14 won't take it.  
15 Q. Okay. And I asked you this before. Was  
16 there an agreement or was there not with regards to  
17 the proceeds from the cow chow?  
18 A. There was a tentative agreement, but that is  
19 as far as any of the negotiations ever went.  
20 Q. And what was the tentative agreement with  
21 the proceeds?  
22 A. That the proceeds would be returned to  
23 Silver Creek as a part of the settlement.  
24 Q. Okay. And was there any discussion at the  
25 April 24th meeting or the first meeting in May about

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1 Sunrain paying the contract price for the seed  
2 potatoes?  
3 A. We talked about a lump sum settlement. We  
4 didn't talk about specific contract pricing for  
5 individual lots. Again, our rationale was trying to  
6 make it so Mark could continue. We understood that he  
7 was new to the world, trying to expand his business,  
8 and we were trying to figure out some way that we  
9 could help him to continue on.  
10 Q. Do you recall what your lump sum settlement  
11 offer was?  
12 A. You know, I think that Lisa provided some of  
13 that in her affidavit, but maybe I -- somewhere in the  
14 neighborhood of 460,000 is what I recall.  
15 Q. And why did Sunrain offer 400,000 if they  
16 had already rejected the potatoes?  
17 A. Like I mentioned, we were trying to help  
18 Mark out. You know, we are a young company. Mark is  
19 a young company. Initially we really did want to have  
20 a long-term relationship with Mark. He had this issue  
21 on his farm. Had it in two separate lots. That's not  
22 a good thing. We did feel like eventually he could  
23 get recovered, and we could do business down the road.  
24 Unfortunately, it didn't work out that way.  
25 Q. Okay. Any other meetings with Mark after

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1 May 24th?  
2 A. No. No. I ran into him at the potato expo  
3 and shook his hand and said, hi, but no meetings in  
4 relation to this.  
5 Q. And has Sunrain paid any of the cow chow  
6 proceeds to Silver Creek?  
7 A. No. We are still holding them in an  
8 account.  
9 MR. WRIGHT: Let's take a break.  
10 (Recess taken from 2:40 p.m. to 2:44 p.m.)  
11 MR. WRIGHT: Back on the record.  
12 Q. (BY MR. WRIGHT) I've handed you what has  
13 already been marked as Exhibit 101 in Mel Davenport's  
14 deposition.  
15 Do you recognize this document?  
16 A. I do.  
17 Q. What is this document?  
18 A. This is a Blanket Variety Contract between  
19 Sunrain and Silver Creek.  
20 Q. And is this the form contract used by  
21 Sunrain first growers?  
22 A. Correct.  
23 Q. A few questions on this. On the paren one  
24 and the term, the fourth sentence down says, "Parties  
25 will endeavor to meet pricing laid forward based on

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1 Q. Did Sunrain purchase the 84180 and the  
2 Chieftain varieties from Ebe Farms to grow out in  
3 Nevada in 2011?  
4 A. Correct.  
5 Q. Okay. So can you explain that process to  
6 me. Ebe Farms grew those varieties in 2010, and then  
7 were those stored at Ebe Farms from 2010 to spring of  
8 2011?  
9 A. You know, I wasn't involved in the company  
10 at that point in time, so I couldn't tell you. We  
11 could certainly talk to Greg, and he could tell us  
12 where those were stored, but I couldn't tell you. I  
13 don't know.  
14 Q. Do you know if Sunrain's trucks picked those  
15 potatoes up from Ebe Farms?  
16 A. We don't have trucks, and so it would have  
17 to have been a third party. I don't know how that  
18 transpired. It was two years before I came on board,  
19 so I don't know.  
20 Q. And do you have any documents that would  
21 show who shipped those potatoes from Ebe Farms?  
22 A. I don't. I'm sure they could be sourced,  
23 but I don't.  
24 Q. What do you mean, they could be sourced?  
25 What do you mean by that?

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1 A. Well, I'm sure there is bill of ladings that  
2 either Greg has or we have, but -- my guess would be  
3 it would have to come from Greg in order to get those  
4 bill of ladings at this point in time -- this far out,  
5 but I don't have it in my personal possession.  
6 Q. Okay. And where were those shipped -- the  
7 84180 and the Chieftains, where were they shipped as  
8 they left Ebe Farms?  
9 A. As I stated previously, I don't know. I  
10 really don't. That was two years prior to me coming  
11 into the company. I had absolutely no involvement  
12 whatsoever. Because we were not concerned in the  
13 least with that being the source where there has been  
14 a year in between, and he didn't have a positive test  
15 until the year after we were there, we haven't done  
16 investigation into shipping methods or timing or  
17 anything like that. We just didn't see the need for  
18 it.  
19 Q. Okay. And do you know who cut the potatoes?  
20 A. What's that?  
21 Q. Do you know who cut those 84180s and  
22 Chieftains before you planted them in Nevada?  
23 A. I don't.  
24 Q. And do you know who shipped the potatoes  
25 from the cutter to Nevada?

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1 A. I don't.  
2 Q. You would have just hired a trucking company  
3 to do that?  
4 A. Very possible. Again, two years before I  
5 came on board, so I couldn't tell you. I assume Doug  
6 John probably could, but I couldn't tell you.  
7 Q. And then they were planted in Nevada in  
8 2011; is that correct?  
9 A. Correct.  
10 Q. And do you know who shipped the potatoes  
11 from Nevada to Silver Creek storage?  
12 A. I don't. Again, it would have been a third  
13 party, because we don't own our own trucks. So it  
14 would have been a hired trucking company.  
15 Q. Okay. And do you guys use the same company  
16 every time?  
17 A. No. We have the same sanitation  
18 requirements regardless of who it is, but we don't use  
19 the same company.  
20 Q. And what are the sanitation requirements?  
21 A. We use quaternary ammonia to wash the truck  
22 down prior to moving the seed. So we require them to  
23 go through a truck wash to get any of the loose dirt,  
24 and then use the quaternary ammonia to wash down the  
25 trucks in case of any potential bacteria.

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1 Q. And who at Sunrain oversees that process?  
2 A. That would have been Doug John, if you are  
3 talking to -- about Nevada.  
4 Q. Okay. And do you know if anybody oversaw  
5 the shipping process from the cutter to Nevada?  
6 A. I'm sure someone did, but I couldn't tell  
7 you who it was.  
8 Q. And I believe Doug John testified that they  
9 were all grown at -- I think, Loggies Junction down in  
10 Nevada.  
11 A. It could be. Again, I don't know. I've not  
12 been down to where they were. We haven't been back  
13 since, so...  
14 Q. Was there any other potatoes that were grown  
15 at Loggies Junction in 2011 by Sunrain that went  
16 somewhere else besides Silver Creek?  
17 A. So some of the 84180s went to a commercial  
18 grower. I think that they made a stopover in the  
19 Carey storage. So they were probably handled by Mark  
20 and then were handled as they went back out. As I  
21 said earlier, that was the year that really drove the  
22 demand. Because of the performance of that seed, we  
23 had people just chomping at the bit. I mean, these  
24 guys had record yields and record pack outs and were  
25 kind enough to tell everybody in the coffee shop just

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<p>1 in time for me not to have any seed to sell them.</p> <p>2 Q. Who was the commercial grower? Do you</p> <p>3 remember?</p> <p>4 A. It was Wootens.</p> <p>5 Q. Did anyone else receive the 2011 seed</p> <p>6 potatoes that you grew in Nevada?</p> <p>7 A. That's the only one that I know about.</p> <p>8 There could have been others. I'm sure we would have</p> <p>9 documentation if there were, but I don't know of any</p> <p>10 others. I just know that one because unfortunately</p> <p>11 they were also the recipient of Mark's potatoes with</p> <p>12 BRR, and they had a real mess -- a real mess with the</p> <p>13 potatoes they received from Mark with BRR. And so the</p> <p>14 comparison between the two was hammered into my head</p> <p>15 over several meetings with those guys as far as the</p> <p>16 year we got them from you guys, they were beautiful;</p> <p>17 we get them from Mark Johnson, and we have a total</p> <p>18 wreck with our crop.</p> <p>19 Q. Okay. So the Wootens received the 84180s in</p> <p>20 2012 and 2013?</p> <p>21 A. Correct. Record yields one year; record</p> <p>22 disaster the next, so -- it is what it is.</p> <p>23 Q. How did the Wootens discover the bacterial</p> <p>24 ring rot in 2013?</p> <p>25 A. We notified them of what we had done. We</p>	<p>1 the breakdown was substantial. I mean, they really</p> <p>2 had big, big problems.</p> <p>3 Q. And the Wootens in 2013, do you know if they</p> <p>4 were growing the 84180s for seed potatoes the</p> <p>5 following year or for --</p> <p>6 A. No. As fresh. Both years as fresh. They</p> <p>7 are not seed growers. They are commercial growers.</p> <p>8 Q. And did they have any issues with the 84180s</p> <p>9 in 2012?</p> <p>10 A. No. Record yields. Best they have ever had</p> <p>11 down there. Record pack outs. That's why they wanted</p> <p>12 a bunch more of it in 2013. If we would have allowed</p> <p>13 them, they would have probably bought the entire</p> <p>14 amount, but we were trying to separate it out. I just</p> <p>15 don't recall who else we were trying to get it to.</p> <p>16 And thank goodness, we didn't, because what had ended</p> <p>17 up happening, but --</p> <p>18 Q. Did the 84180s that Wootens bought in 2012,</p> <p>19 did those come straight from Nevada, or did they go</p> <p>20 to --</p> <p>21 A. I believe they made a stopover in Carey.</p> <p>22 Because there was not storage able available in</p> <p>23 Nevada, that's why things went to Carey initially.</p> <p>24 Mark had been working with Sunrain, in my</p> <p>25 understanding, previous to that in some capacity or</p>
Page 55	Page 57
<p>1 felt it was our obligation to let them know that we</p> <p>2 had I guess for all intents and purposes acted as a</p> <p>3 broker, since it is the way the transactions worked</p> <p>4 out on the infected side. Mark was very good, and</p> <p>5 Mark was up front with them. He told them what had</p> <p>6 happened, that he didn't know there was a problem at</p> <p>7 the time, but that he had shipped out BRR infected</p> <p>8 seed.</p> <p>9 And I believe -- and I wasn't there, so I</p> <p>10 don't know when it happened, but I do believe that</p> <p>11 Mark went down to the Wooten field, met with those</p> <p>12 guys, talked to them about what had happened,</p> <p>13 apologized for his role in sending that seed out to</p> <p>14 them.</p> <p>15 Q. And at that point, the seed had already been</p> <p>16 planted by the Wootens?</p> <p>17 A. Correct. Which is the very unfortunate</p> <p>18 thing. We could have saved them a lot of trouble and</p> <p>19 a lot of money had we known in time.</p> <p>20 Q. And what happened with the Wootens 2012</p> <p>21 84180 crop?</p> <p>22 A. It was a disaster.</p> <p>23 Q. Okay.</p> <p>24 A. A serious yield loss. Their pack out was</p> <p>25 terrible. The rejections on the other end, because of</p>	<p>1 another, and so he agreed to help them out by working</p> <p>2 the storage -- managing the storages for them, and</p> <p>3 then also agreed to plant some back the following</p> <p>4 year. Again, as that was transpiring, I wasn't a part</p> <p>5 of the company, so this is just my understanding of</p> <p>6 how that process worked.</p> <p>7 Q. Okay. Do you know if the Wootens did any</p> <p>8 PCR or ELISA testing on the 84180s that they grew in</p> <p>9 2012?</p> <p>10 A. I don't know why they would have any reason</p> <p>11 to. The expression in 2013 in that crop was pretty</p> <p>12 obvious. I mean, you could see it in the field. And</p> <p>13 if they had seen anything like that in 2012, I would</p> <p>14 assume that they would do similar testing. We had</p> <p>15 already done ELISA testing before it went to them, and</p> <p>16 it come back negative, so I would assume that they</p> <p>17 probably would stand on that, since it is the</p> <p>18 recognized standard.</p> <p>19 Q. And where do things stand with the Wootens</p> <p>20 at the present time? Have they paid Sunrain anything</p> <p>21 for the 84180s?</p> <p>22 A. They have not.</p> <p>23 Q. And have they threatened to sue Sunrain?</p> <p>24 A. We've had discussions back and forth. You</p> <p>25 know, we have described to them the role that we</p>

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho)  
limited liability company,            ) Case No.  
          Plaintiff/Counterdefendant,) CV-2013-644  
vs.                                        )  
SUNRAIN VARIETIES, LLC, a            )  
Delaware limited liability            )  
company,                                )  
          Defendant/Counterclaimant. )  
\_\_\_\_\_)

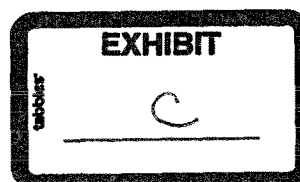
DEPOSITION OF MELVIN DAVENPORT

July 2, 2014

REPORTED BY:

JANET FRENCH, CSR NO. 946

Notary Public



Page 2

1           THE DEPOSITION OF MELVIN DAVENPORT was taken  
2 on behalf of the Plaintiff/Counterdefendant, at the  
3 offices of Beard St. Clair Gaffney, P.A., located at  
4 2015 Coronado Street, Idaho Falls, Idaho, commencing  
5 at the hour of 9:30 a.m. on July 2nd, 2014, before  
6 Janet French, Certified Shorthand Reporter and Notary  
7 Public within and for the State of Idaho, in the  
8 above-entitled matter.  
9  
10                   **APPEARANCES:**  
11 For the Plaintiff/Counterdefendant:  
12       **WRIGHT BROTHERS LAW OFFICE, PLLC**  
13       By: Andrew B. Wright  
14       1166 Eastland Drive North, Suite A  
15       Post Office Box 226  
16       Twin Falls, Idaho 83303  
17 For the Defendant/Counterclaimant:  
18       **BEARD ST. CLAIR GAFFNEY, PA**  
19       By: Michael D. Gaffney  
20       2105 Coronado Street  
21       Idaho Falls, Idaho 83404  
22  
23  
24  
25

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6	EXHIBITS	
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9	Potato Grower Contract, Blanket Variety	
10	Contract	
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P R O C E E D I N G S

1  
2  
3           MELVIN DAVENPORT,  
4 first duly sworn to tell the truth relating to said  
5 cause, testified as follows:  
6  
7                   **EXAMINATION**  
8 **QUESTIONS BY MR. WRIGHT:**  
9       Q. Would you please state your full name for  
10 the record.  
11       A. Melvin Davenport.  
12       Q. Mr. Davenport, have you had your deposition  
13 taken before?  
14       A. Yes, I have.  
15       Q. In what case did you have your deposition  
16 taken?  
17       A. Recently in regards to the class action  
18 lawsuit that Potandon is involved in that was taken --  
19 that deposition was taken a week ago today, I believe.  
20       Q. Do you have any questions about the process  
21 before we get started?  
22       A. No, sir.  
23       Q. Okay. Did you receive a subpoena to attend  
24 today's deposition -- or your attorney?  
25       A. Our attorney told me to be here.

Page 5

1       Q. And did you bring any documents pursuant to  
2 that subpoena duces tecum with you today?  
3       A. No, I did not, sir. I believe I've turned  
4 over all our documents to our attorney, to the best I  
5 know.  
6       Q. Tell me about your relationship with  
7 Sunrain.  
8       A. My relationship -- well, my position is  
9 president of the company.  
10       Q. Okay. And are you a member of Sunrain?  
11       A. Of the LLC?  
12       Q. Yes.  
13       A. I am a member of Potandon, which is a member  
14 of Sunrain.  
15       Q. And what are your duties as president with  
16 Potandon?  
17       MR. GAFFNEY: You mean, Sunrain?  
18       MR. WRIGHT: Sunrain. Sorry.  
19       THE WITNESS: I would say my duties at Sunrain --  
20 it's not a full-time job as president of the company.  
21 I have another job. My duties is to help direct the  
22 strategic direction of the company. Most day-to-day  
23 operations are handled by the business manager, the VP  
24 of operations and the VP of finance. And the only  
25 active day-to-day thing that I'm involved in is

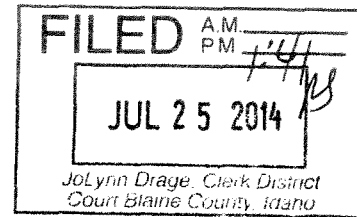


Page 6	Page 8
<p>1 long-term variety selection.</p> <p>2 Q. And what is your other full-time job?</p> <p>3 A. I'm chief operating officer at Potandon</p> <p>4 Produce.</p> <p>5 Q. And can you explain to me the different</p> <p>6 businesses that Potandon is involved in compared to</p> <p>7 Sunrain.</p> <p>8 A. Sunrain is an independent business, but</p> <p>9 Potandon has an ownership stake in Sunrain, and we do</p> <p>10 manage -- we are the -- Potandon is the manager of the</p> <p>11 LLC for Sunrain and Potato Seed Solutions.</p> <p>12 Q. And is Potandon involved in the seed potato</p> <p>13 business --</p> <p>14 A. No.</p> <p>15 Q. That's -- all the seed potato is handled</p> <p>16 through Sunrain?</p> <p>17 A. Sunrain is completely responsible for all</p> <p>18 that. Potandon is a customer of Sunrain, and that is</p> <p>19 the relationship.</p> <p>20 Q. And you mentioned two other positions that</p> <p>21 generally handle the day-to-day operations of Sunrain.</p> <p>22 Who would those individuals be?</p> <p>23 A. Currently?</p> <p>24 Q. Yes.</p> <p>25 A. The vice president of finance would be Lisa</p>	<p>1 A. Mark was a seed grower under contract for</p> <p>2 us, and we had day-to-day business operations with</p> <p>3 him.</p> <p>4 Q. And does Sunrain grow any of its own seed</p> <p>5 potatoes or is all that contracted out?</p> <p>6 A. At that time it was all contracted out.</p> <p>7 Q. And is it still all contracted out?</p> <p>8 A. No. We actually grow some of our own now.</p> <p>9 Q. Okay. When did you, I guess, first become</p> <p>10 involved with Sunrain's relationship with Silver</p> <p>11 Creek? When did you --</p> <p>12 A. Other than meeting Mark maybe at a</p> <p>13 convention, I had no personal involvement with him at</p> <p>14 all until the issue with the 84180s come up.</p> <p>15 Q. And when was the first time that you had</p> <p>16 that discussion with Mark concerning the 84180s?</p> <p>17 A. Right after we were notified that the seed</p> <p>18 was not certifiable.</p> <p>19 Q. And do you know approximately when that</p> <p>20 would have been?</p> <p>21 A. Off the top of my head, I would guess April</p> <p>22 of 2012 -- or -- 2013, I guess.</p> <p>23 Q. And did you have a meeting with Mark at that</p> <p>24 time?</p> <p>25 A. Yes, sir.</p>
Page 7	Page 9
<p>1 Swenson. The vice president of operations is Kelly</p> <p>2 Stoddard, and the business manager is Aron Derbridge.</p> <p>3 Q. And when was Sunrain formed? Do you know?</p> <p>4 A. Sun -- I believe five years ago. I don't</p> <p>5 know -- your question, whether it means when our</p> <p>6 involvement -- Potandon's involvement in Sunrain or</p> <p>7 when the company originally was founded.</p> <p>8 Q. Okay. So it was originally founded when?</p> <p>9 A. I don't know the exact date. We bought into</p> <p>10 the company five, six years ago.</p> <p>11 Q. And currently is Sunrain operating at the</p> <p>12 same level as it was two or three years ago?</p> <p>13 A. No. We have -- I would say the company is</p> <p>14 doing -- has added some business operations to it. It</p> <p>15 is still a start-up company, so it is still what I</p> <p>16 would call a struggling company.</p> <p>17 Q. Okay. When did Sunrain first become</p> <p>18 involved with Silver Creek Seed?</p> <p>19 A. I'm going to have to guess -- 2008 or 2009</p> <p>20 seed crop. I don't know the exact year. I can't</p> <p>21 remember. Jeff Bragg was the vice president of</p> <p>22 operations at that time, and he set up this</p> <p>23 relationship.</p> <p>24 Q. And what's been your understanding of the</p> <p>25 relationship from 2008 to 2009 to the present?</p>	<p>1 Q. And who else was at that meeting?</p> <p>2 A. I believe I had two meetings with Mark. The</p> <p>3 first meeting -- and this is just to the best of my</p> <p>4 recollection. It would have been myself; Jeff Bragg;</p> <p>5 Aron Derbridge -- maybe Doug John was there. I can't</p> <p>6 remember -- Mark Johnson, his wife, and I believe his</p> <p>7 secretary was in the room.</p> <p>8 Q. And that was your first meeting with Mark?</p> <p>9 A. The first real business meeting, yes, sir.</p> <p>10 Q. And when was the second meeting?</p> <p>11 A. Thirty, 40 days later.</p> <p>12 Q. Okay. Would that have been in May?</p> <p>13 A. I believe May. I can't give you an exact</p> <p>14 date without my calendar and -- I just can't.</p> <p>15 Q. And who was at that second meeting?</p> <p>16 A. Myself; Aron Derbridge; Kelly Stoddard; I</p> <p>17 believe, Mark, his wife, and his secretary -- I</p> <p>18 believe. I could be a person or two off on these, as</p> <p>19 far as I just can't remember the exact people</p> <p>20 involved.</p> <p>21 Q. Okay. And where did these meetings take</p> <p>22 place?</p> <p>23 A. Both of them took place at Mark Johnson's</p> <p>24 scale house office.</p> <p>25 Q. And besides those two meetings, have you had</p>

Page 10	Page 12
<p>1 any other meetings with Mark Johnson?</p> <p>2 A. What I don't remember exactly is whether we</p> <p>3 had two or three meetings. I just can't remember</p> <p>4 exactly. We may have had three meetings. I can't</p> <p>5 remember. I just -- those specifics -- I may -- we</p> <p>6 may have met three times or we may have met twice. I</p> <p>7 don't remember the exact times we met. Other than</p> <p>8 that, I have not met with Mark.</p> <p>9 Q. And did all those meetings, whether it is</p> <p>10 two meetings or three meetings, occur at Mark's</p> <p>11 facility?</p> <p>12 A. Yes, sir.</p> <p>13 Q. And would all of those two or three meetings</p> <p>14 have occurred in April or May of 2012?</p> <p>15 A. April, May, or June.</p> <p>16 Q. Okay. Let's talk about the first meeting in</p> <p>17 April 2012. What was discussed at that meeting?</p> <p>18 A. We went over the issue we had with the seed</p> <p>19 that the bacterial ring rot was found in. We</p> <p>20 discussed the fact that we had already planted one</p> <p>21 field of that seed and that was an issue for us. We</p> <p>22 went over the fact that the rest of the seed was non</p> <p>23 certifiable, and there was no way we could take it.</p> <p>24 And we discussed in very broad strokes any</p> <p>25 way to resolve the issue between us and them in an</p>	<p>1 Q. Or the best as you can recall at the moment.</p> <p>2 A. We weren't -- yes, that we were not going to</p> <p>3 be accepting the seed. That's the best synopsis I can</p> <p>4 give you.</p> <p>5 Q. And who told Mark that? Did you tell Mark</p> <p>6 that? Did Aron Derbridge tell Mark that?</p> <p>7 A. I think that would have been me.</p> <p>8 Q. And did you tell him why you were not</p> <p>9 accepting the seed?</p> <p>10 A. Yes. Because it -- with the bacterial ring</p> <p>11 rot found on his farm, all the lots on the farm were</p> <p>12 not certifiable for their intended purposes.</p> <p>13 Q. And so what did you discuss with Mark</p> <p>14 Johnson with regards to how to resolve this issue?</p> <p>15 A. We went through it lot by lot and tried to</p> <p>16 discuss an amicable -- we didn't want to have a major</p> <p>17 argument with the guy. We wanted to try to sit down</p> <p>18 and come up with some kind of amicable solution that</p> <p>19 would meet both parties' needs. I did make it very</p> <p>20 clear that we were not going to pay for all the seed</p> <p>21 under any circumstance. Because we couldn't resell</p> <p>22 it. We could not use it for our intended purposes,</p> <p>23 that we could not recertify it, which it had to be</p> <p>24 done for us to use.</p> <p>25 Q. And are you familiar with the testing that</p>
Page 11	Page 13
<p>1 amicable manner, and I tried to explain that Sunrain</p> <p>2 was not going to hold the bag on the entire pile of</p> <p>3 seed because it was non certifiable. We had it all</p> <p>4 sold -- almost -- most of it sold somewhere else, and</p> <p>5 there was no way for us to sell it now, and I could</p> <p>6 not be held responsible for paying for something that</p> <p>7 did not meet certification, and I couldn't resell it.</p> <p>8 It wasn't -- it was not -- it did not meet the</p> <p>9 contract requirements.</p> <p>10 Q. Okay. And what you just explained to me,</p> <p>11 did you specifically tell that to Mark Johnson at that</p> <p>12 April 2012 meeting?</p> <p>13 A. Oh, absolutely.</p> <p>14 Q. Did you --</p> <p>15 A. I mean, there was -- I don't think there was</p> <p>16 any doubt in anybody's mind in that room that the seed</p> <p>17 was not going to leave the farm for what it was</p> <p>18 intended for.</p> <p>19 Q. And did you specifically tell Mark at that</p> <p>20 April 2012 meeting that Sunrain was rejecting the --</p> <p>21 all of the potatoes?</p> <p>22 A. Yes, I believe we did.</p> <p>23 Q. And do you remember specifically what you</p> <p>24 told him with regards to rejection?</p> <p>25 A. The exact words?</p>	<p>1 Silver Creek did with Agdia and North Dakota State on</p> <p>2 these potatoes?</p> <p>3 A. You mean, the test that found the bacterial</p> <p>4 ring rot.</p> <p>5 Q. Are you familiar with the test that Mark</p> <p>6 Johnson did with all of the potatoes where they sent</p> <p>7 off tuber samples to Agdia and North Dakota State?</p> <p>8 A. You mean, on his own lots of seed potatoes,</p> <p>9 sir?</p> <p>10 Q. The Sunrain lots.</p> <p>11 A. No, I'm not aware of his testing. I'm aware</p> <p>12 of our testing.</p> <p>13 Q. Okay. And what was the extent of your</p> <p>14 testing on these potatoes?</p> <p>15 A. We did every standard thing that is done to</p> <p>16 resell seed potatoes. We had the winter test done.</p> <p>17 We had the ELISA test done. We did all of our normal</p> <p>18 practices that we would do. And the reason that the</p> <p>19 bacterial ring rot was found in this lot of potatoes</p> <p>20 is because we were going to send some of them to</p> <p>21 Canada, and we had a test done so we could do that,</p> <p>22 and that's when this was discovered.</p> <p>23 Q. And are you aware of any testing that Silver</p> <p>24 Creek Seed did on the various lots of potatoes that it</p> <p>25 was to sell to Sunrain?</p>

Page 26	Page 28
<p>1 A. There is no way we could make them 2 certifiable, sir. 3 Q. And is it your understanding that if one lot 4 tests positive for bacterial ring rot, then the 5 entire -- all of the lots on the farming operation are 6 not certifiable? 7 A. Yes. 8 Q. Paragraph 5 on Exhibit 101 says, "See 9 Attachment B." Do you know if that was attached to 10 this agreement? 11 A. I assume it was. I can't say, you know, yes 12 or no. 13 Q. Okay. Have you ever seen an Exhibit 14 Attachment B that it is referring to? 15 A. Yes, sir. 16 Q. But you don't have any personal knowledge 17 whether that was or was not attached? 18 A. No. 19 Q. Would that be the same for Attachment A that 20 is referenced in this? 21 A. Where is Attachment A referenced, sir? 22 Q. In paren 4, the middle of the paragraph. 23 When it first agrees to follow Sunrain, Potandon's 24 Solanum seed grower protocol. 25 A. I'm still not seeing where you are seeing</p>	<p>1 Silver Creek's operation? 2 A. No. I had never been there. Jeff had been 3 there. Aron had been there. And Kelly was there 4 after he took -- started to make the transfer into 5 Jeff's job. 6 Q. And did any of those people express to you 7 concerns about Silver Creek's cleanliness or 8 procedures, anything like that? 9 A. There was comments made that there should be 10 some cleanliness changes long term. That's all I 11 remember, sir. 12 Q. And that would have been before this variety 13 contract? 14 A. No. I don't -- I can't remember when that 15 would have been -- that statement. That was a casual 16 statement inside a meeting -- in a staff meeting one 17 time. 18 Q. And did Sunrain ever do anything with those 19 comments that it received? 20 A. I actually can't remember, sir, what was 21 done. You would have to ask one of the day-to-day 22 people what was or was not done. 23 I think you need to understand that one of 24 the things that goes on in our business is I am top 25 level, and in this case, as we were running into the</p>
Page 27	Page 29
<p>1 it. 2 Q. Right there. 3 A. All I can say is the same as I said about 4 the other attachment. I assume it was, but I have no 5 way of knowing for sure. I would have to go back and 6 have somebody pull it up at the office. 7 Q. Besides this blanket variety contract, did 8 Sunrain and Silver Creek have any other agreements 9 related to these potatoes? 10 A. Not that I am aware of. The fact is in our 11 last meeting I even asked Mr. Johnson if Mr. Bragg had 12 ever indicated to him how we would or would not settle 13 this, and he made it clear that Jeff had not. And the 14 reason I asked that question is because by that period 15 Jeff was no longer in our employ. 16 Q. And why was Jeff Bragg no longer in your 17 employ at that point? 18 A. He left the company. 19 Q. And do you know why he left the company? 20 A. He wanted to do something else. 21 Q. Did it have anything to do with the subject 22 of this lawsuit, to your knowledge? 23 A. No, I don't think there was any correlation. 24 Q. Prior to the discovery of the bacterial ring 25 rot in this case, did you have any concerns with</p>	<p>1 problems, I authorized Aron. Aron was the authorized 2 person to go try to resolve this. 3 Q. Okay. What is Sunrain's relationship with 4 Ebe Farms, LLC, out in Washington? 5 A. That's a grower that we had purchased some 6 seed from in previous years -- quite a few previous 7 years ago. 8 MR. GAFFNEY: Are you going to go off kind of 9 into a different thing here? Can we take a break 10 here? 11 MR. WRIGHT: You bet. 12 (Recess taken from 10:11 a.m. to 10:14 a.m.) 13 MR. WRIGHT: Back on the record. 14 Q. (BY MR. WRIGHT) Backing up. With those 15 meetings that you had with Mark Johnson, would Lisa 16 Swenson had been at those meetings? 17 A. To my knowledge, she was not. 18 Q. Okay. 19 A. It is possible. I don't remember, but to my 20 knowledge, she was not. 21 Q. And with this rejection issue that we talked 22 about during those meetings, did Aron Derbridge ever 23 tell Mark Johnson that Sunrain was rejecting the 24 potatoes, or did that just come from you? 25 A. Well, I think he was told that by multiple</p>

Michael D. Gaffney, ISB No. 3558  
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Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

Case No.: CV-2013-644

MEMORANDUM IN SUPPORT OF  
MOTION TO RECONSIDER

Sunrain Varieties LLC (Sunrain), through its attorneys of record, respectfully submits the following in support of its motion to reconsider the Court's decision granting the Amended Motion for Partial Summary Judgment filed by Silver Creek Seed, LLC (Silver Creek).

**INTRODUCTION**

On Silver Creek's motion for partial summary judgment, Sunrain presented evidence by affidavit that demonstrated that Sunrain rejected non-conforming seed potatoes tendered by Silver Creek. This Court, however, struck the affidavits because, in the Courts opinion they lacked specificity. In the days immediately following the hearing on summary judgment, Silver Creek took the depositions of Aron Derbidge and Melvin

Davenport of Sunrain and elicited extensive testimony regarding Sunrain's rejection of the non-conforming seed potatoes. This newly developed evidence demonstrates that disputed issues of fact exist regarding the conformity of Silver Creek's seed potato crop to the terms of the contract and Sunrain's rightful rejection of that crop. Because the seed crop produced by Silver Creek was not merchantable and was not fit for its ordinary or intended purpose, it did not conform to the contract and Sunrain had a right to reject the entire seed crop. Sunrain communicated its rejection of the crop to Silver Creek in a reasonable time after discovery of the non-conformity. The evidence as discussed below, demonstrates the existence of disputed issues of fact sufficient to preclude summary judgment, and the Court should reconsider its decision on the motion for partial summary judgment.

#### **STATEMENT OF FACTS**

The following facts are relevant to the Court's consideration of this motion for reconsideration:

1. On or about May 10, 2012, Sunrain and Silver Creek entered into a contract titled Sunrain Potato Varieties, L.L.C. Seed Potato Grower Contract – Blanket Variety Contract (the Contract). Affidavit of Mark Johnson dated June 3, 2014 (Johnson Aff. I), Exh. D.

2. The purpose of the Contract according to the recitals was to provide Sunrain a “secure, clean source of certified potato seed of Proprietary varieties, for Sunrain's/ [sic] 2013 commercial planting seasons.” *Id.*

3. “Pursuant to the Contract, Silver Creek cut and grew various varieties and generations of Sunrain seed potatoes, including 84180, Red Fantasy, Laura, Annabelle, Rumba, Allians, and Carrera . . . during the 2012 growing season.” Johnson Aff. I, ¶ 12.

4. With the unique exception of the A81480-8 variety, all of the seed planted and grown by Silver Creek under the Contract was first or second generation seed.

Deposition of Mark Johnson (Johnson Depo.), Exh. 12.

5. The A-84180-8 variety was third generation seed. *Id.*

6. Silver Creek understood and was aware that the seed it was producing was intended to be used by Sunrain to grow future generations of seed potatoes. Johnson Depo., p 40, l. 15-p. 41, l. 9.

7. Under the Contract, seed grown by Silver Creek was to “conform to Idaho Crop Improvement Association standards for the generation being delivered to Sunrain.” It was also required to “meet all certification requirements of the State of Idaho.” Johnson Aff., Exh. D, ¶ 4.

8. Silver Creek expressly warranted that seed grown by it would be of merchantable quality and fit for its intended use, in other words that it would be fit for use in growing future generations of certified seed potatoes and sellable for that purpose. *Id.* at ¶ 13; Johnson Depo., p 40, l. 15-p. 41, l. 9.

9. Silver Creek impliedly warranted that seed supplied to Sunrain would “pass without objection in the trade under the contract description[.]” and be “fit for the ordinary purpose for which such goods are used[.]” IDAHO CODE ANN. § 28-2-314(2)(a) & (c).

10. Silver Creek also impliedly warranted that seed supplied to Sunrain would be suitable for the production of future generation certified seed. IDAHO CODE ANN. § 28-2-315; Johnson Aff. I, Exh. D.

11. Prior to March 29, 2013, Sunrain took delivery of a portion of the A84180-8 variety grown by Silver Creek and delivered them to a commercial grower in Washington, Wooten Farms (Wootens). Johnson Aff. I, ¶ 19; Derbidge Depo., p. 54, l. 19-p. 55, l. 14.

12. Wootens had experience with the A84180-8 variety having grown it during 2012 from the same seed source as those grown by Silver Creek, and had obtained record yields and record pack-outs. Derbidge Depo., p. 53, l. 14-p. 54, l. 18.

13. On March 29, 2013, the Idaho Crop Improvement Associations (ICIA) notified Silver Creek that *Clavibacter michiganensis* subspecies *sepedonicus*, the bacteria that causes bacterial ring rot was detected in the A84180-8 variety grown by Silver Creek for Sunrain during the 2012 growing season. Johnson Aff. I, Exh. E.

14. ICIA promulgates rules for the certification of seed potatoes in Idaho and maintains a zero tolerance factor for bacterial ring rot under which the presence of bacterial ring rot “at any time in a seed lot” disqualifies the lot for certification. Johnson Aff. I, ¶ 18 & Exh. H., p. 5.

15. The ICIA rules further provide: “All contact lots on a farming operation shall be ineligible for recertification if any lot of seed on that farming operation is rejected for certification because of bacterial ring rot.” *Id.*, Exh. H, p. 13.

16. As a consequence of the discovery of bacterial ring rot as reported by ICIA on March 29, 2013, “seed lots (83120026, A84180-8) and (83120025, A84180-8) are disqualified from certification due to bacterial ring rot and all other G1 and later generation seed lots on the farm are ineligible for recertification.” *Id.*

17. Immediately upon learning of the presence of bacterial ring rot, Mark Johnson (Johnson) of Silver Creek contacted Jeff Bragg with Sunrain and informed him of the presence of bacterial ring rot in the 2012 seed crop. Johnson Depo., p. 72, ll. 18-25.

18. Jeff Bragg notified Derbidge of the contamination during the first week of April 2013 while Derbidge was traveling with his family. Deposition of Aron Derbidge (Derbidge Depo.), p. 7, ll. 3-14.

19. Upon returning from his travels, Derbidge contacted Johnson by telephone during the second week of April 2013 to discuss the problem. During the course of that discussion he informed Johnson that Sunrain had to reject the seed crop because it could not be recertified. Derbidge Depo., p. 8, l. 6-p. 9, l. 1. Derbidge was authorized to speak and negotiate on behalf of Sunrain. Deposition of Mel Davenport (Davenport Depo.), p. 28, l. 18-p. 29, l. 2.

20. Derbidge and Johnson discussed and agreed that the non-contaminated seed would not be eligible for recertification and Derbidge informed Johnson that although Sunrain had rejected the seed, potential options to mitigate losses for the crop were: (1) to run the crop as fresh-pack potatoes; (2) see if any commercial growers were willing to plant the seed as part of a production operation for non-seed production; or (3) sell it as cattle feed. Derbidge Depo., p. 9, l. 12-p. 10, l. 7.

21. Efforts were made to identify commercial growers who could purchase the seed potatoes and grow them out as production potatoes during the 2013 growing season, but those growers contacted were unwilling to take any of the seed because the potential risk was too high. *Id.*, p. 10, l. 13-p. 12, l. 3.



22. On or about April 24, 2013, after ruling out the possibility of using the seed potatoes for commercial production, Derbidge, along with Mel Davenport and Jeff Bragg of Sunrain, met with Johnson, along with his secretary, at Silver Creek's office. *Id.*, p. 22, ll. 10-24.

23. The parties discussed the struggle to find commercial growers to take the seed and the fact that the seed would not meet Sunrain's needs because it could not be recertified. During that meeting, Derbidge specifically told Johnson that Sunrain was rejecting the seed, but that it would work with him to figure out another way to get it moved out. *Id.*, p. 22, l. 25-p. 24, l. 11.

24. Derbidge understood that because Sunrain rejected the seed it was not Sunrain's problem to clear Silver Creek's cellars, but Sunrain did not want to leave Silver Creek on its own. It wanted to help Johnson/Silver Creek out in an attempt to minimize losses of its seed grower. *Id.*, p. 24, ll. 12-24.

25. The parties also discussed the possibility of running the seed crop as fresh-pack potatoes and between then and their next meeting in May of 2013 Sunrain attempted and ruled out the possibility of running the seed crop as fresh potatoes. *Id.*, p. 25, l. 13-p. 26, l. 3; p. 27, l. 7-p. 29, l. 14.

26. In May of 2013, Derbidge and Davenport again met with Johnson at Silver Creek's office where the parties discussed the failure of the commercial production option and the fresh-pack option. They discussed that the only real option was to move the seed as cattle feed and then discussed potential settlement numbers to try and put the matter behind the parties in a way that would allow both to stay in business. *Id.*

27. Through the course of their discussions, the parties reached a tentative agreement to move the seed potatoes as cattle feed with the feed price recovered going back to Silver Creek in full and both Silver Creek and Sunrain began moving portions of the seed potato crop to cattle feeders, but at a subsequent meeting on or about May 24, 2013, Johnson informed Derbidge during a meeting at a gas station down the street from Silver Creek's facility that he had retained counsel and would not accept anything less than full contract payment for the seed potatoes. *Id.*, p. 36, l. 21-p. 39, l. 5.

### STANDARD OF REVIEW

"The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B)." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012), reh'g denied (Aug. 1, 2012). On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. *Id.* (citing *PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990))). The burden is on the moving party to bring the trial court's attention to the new facts. *Coeur d'Alene Mining Co. v. First Nat. Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). In the present case, in the days following the hearing on Plaintiff's Amended Motion for Partial Summary Judgment, the plaintiff, through counsel, deposed representatives of the defendants and elicited new facts that bear directly on the correctness of the Court's ruling.

A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

*Id.* (quoting *J.I. Case Company v. McDonald*, 76 Idaho 223, 280 P.2d 1070 (1955)).

Upon a more comprehensive presentation of both law and fact, as set forth below, the Court should reconsider its ruling, deny the motion for partial summary judgment, and allow the matter to proceed toward a full and final adjudication of the disputed issues upon the merits “so that the truth may be ascertained, and justice done, as nearly as may be.” *Coeur d'Alene Mining Co., supra*.

### ARGUMENT

The summary judgment requested by Silver Creek and granted by this Court is inconsistent with the law and the facts applicable to this case. The seed crop grown by Silver Creek during the 2012 crop year did not conform to the Contract for multiple reasons. First, it did not conform to the implied and express warranties of merchantability and fitness for its purpose. Second, the acknowledged and undisputed defects in the contaminated seed substantially impaired the value of the whole contract, indeed, it eliminated any value to Sunrain.

Because the seed did not conform to the Contract, Sunrain was entitled to and did rightfully reject the entire remaining seed crop. There was no ability to cure the defects in Silver Creek’s tender, and Sunrain has no obligation to pay the contract price for the rejected seed.

#### **I. Tendered goods did not conform to the Contract.**

Silver Creek argued on its motion for summary judgment that several of the varieties produced by it were free of bacterial ring rot and that only the Rumba and A84180-8 varieties failed to conform to the Contract. It is Silver Creek’s contention that the non-contaminated varieties conformed to the contract and should be paid for in full.

Neither the law nor the facts support this contention and the Court should reconsider its decision on the motion for partial summary judgment and deny the same.

**A. Tendered goods do not conform to the iexpress warranties under the Contract.**

Under the express terms of the Contract and as a matter of law under the Uniform Commercial Code, Silver Creek extended certain warranties with respect to the 2012 seed crop that were breached as a result of the presence of bacterial ring rot in the crop. Silver Creek expressly warranted that the seed would be “of merchantable quality as set forth herein” and that it would be “fit for their intended use.” Johnson Aff. I, Exh. D, ¶ 13. Similarly, by entering into the Contract, Silver Creek warranted that the seed would “pass without objection in the trade under the contract description” and would be “fit for the ordinary purpose for which such goods are used”, i.e. future seed production, because the warranty of merchantability is not effectively waived in Paragraph 13 of the Blanket Variety Contract. IDAHO CODE ANN. § 28-2-314(2)(a) & (c) and § 28-2-316 .

Silver Creek failed to tender delivery of seed that could be used in the production of future generations of certified seed and has expressly acknowledge through its agent, Mark Johnson, that the seed grown on its farm during 2012 could not be used for future seed production. Silver Creek breached the implied warranty set forth in Section 2-314 and the companion express warranty in the Contract.

First, Silver Creek knew Sunrain was acquiring the seed for use in producing future generations of certified seed and relying on Silver Creek’s skill to furnish suitable seed. This is set forth on the face of the Contract, which provides, “Sunrain wishes to secure a secure, clean source of certified potato seed for Proprietary (sic) varieties, for Sunrain’s/ (sic) 2013 commercial planting seasons[.]” Johnson Aff. I, Exh. D. It further

provides Sunrain is contracting with Silver Creek because it “is in the business to supply certified potato seed.” *Id.* Beyond the plain language of the Contract, Johnson has testified without equivocation that the crop he was selling to Sunrain “were to be grown for seed potatoes” by “[w]hoever Sunrain sold them to.” Johnson Depo., p. 40, ll. 15- p. 41, l. 9.

Second, the seed produced by Silver Creek in 2012 was not fit for the production of future generations of certified seed potatoes. Indeed, it could not, without qualification, be used to produce future generations of certified seed. The ICIA rules for seed potato certification provide, “All contact lots on a farming operation shall be ineligible for recertification if any lot of seed on that farming operation is rejected for certification because of bacterial ring rot.” Johnson Aff. I, Exh. H, p. 13. A contact lot is defined to include any seed lot “produced on a farming operation using common production and handling equipment and/or storage facilities.” Johnson Aff. I, Exh. H, p. 3. Because all seed lots produced by Silver Creek during 2012 were contact lots with the contaminated A84180-8 variety, they were not eligible for recertification. ICIA declared as much in notifying Silver Creek of the bacterial ring rot when it stated, “all other G1 and later generation seed lots on the farm are ineligible for recertification.” Johnson Aff. I, Exh. E. More critically, Johnson concedes the point in asserting his own damage claim when he testifies of his own seed, “This is the seed that we had to buy because our seed was unrecertifiable (sic) due to the contamination of ring rot in our lots. We could not plant back our own seed. So we had to buy new seed. . . . We couldn’t recertify our seed, so we had to go out and buy all new seed.” Johnson Depo., p. 94, l.12-p. 95, l. 1.

The seed potatoes tendered by Silver Creek was not fit for its particular purpose, a purpose which was known to Silver Creek and for which Sunrain was relying upon Silver Creek's skill. As such, the seed potatoes did not conform to the Contract.

In addition to the warranty of fitness for a particular purpose, Silver Creek breached the warranty of merchantability. Again, this warranty was both express and implied. Silver Creek expressly warrants the seed potatoes will be "of a merchantable quality as set forth herein," and Section 2-314 of the Uniform Commercial Code provides, "Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." IDAHO CODE ANN. § 28-2-314(1). To be merchantable, goods must pass without objection in the trade under the contract description; and be fit for the ordinary purpose for which such goods are used. IDAHO CODE ANN. § 28-2-314(2)(a) & (c).

That Silver Creek is a merchant within the meaning of Section 2-314 is not debatable. A merchant is defined, for U.C.C. purposes, as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

IDAHO CODE ANN. § 28-2-104(1). A person includes a limited liability company like Silver Creek. IDAHO CODE ANN. § 28-2-201(27). Silver Creek is in the business of growing seed potatoes, and Johnson, its sole owner, has been involved in that line of work for nearly 30 years. Johnson Depo., p. 6, l. 12-p. 9, l. 7. Silver Creek, organized in 2006, has never been involved in any business other than the growing of seed potatoes.

*Id.*, p. 12, l. 18- p. 13, l. 2. Silver Creek is a merchant and the implied warranty applies in this case.

As such, it was incumbent upon Silver Creek to tender seed potatoes that would pass without objection in the trade under the contract description and be fit for their ordinary purpose. As discussed above, the seed potatoes to be supplied by Silver Creek were early generation seed intended to be used by Sunrain in the production of future generations of certified seed potatoes. Because of the presence of bacterial ring rot in seed potatoes produced on Silver Creek's farms, all other seed potatoes produced on the farm became ineligible for recertification. As such, they were not merchantable. They could not pass without objection in the seed producing industry and they were not fit for future seed production. Silver Creek acknowledged as much when Johnson testified that Silver Creek could not plant back its own seed and had to acquire new seed from a different source because the seed grown by Silver Creek in 2012 could not be recertified. Johnson Depo., p. 94, l.12-p. 95, l. 1.

Even that portion of the seed potatoes that was not intended for use in developing future generations of certified seed was not passable without objection in the potato industry or fit for its ordinary use. Derbidge testified that all first and second generation seed was intended to be replanted for the development of seed, but that third generation seed was to be sold to commercial growers for production. Derbidge Depo., p. 30, l. 18-p. 31, l. 12. A review of Silver Creek's planting records reveals that the only third generation seed planted by Silver Creek was the A84180-8 variety, which ultimately proved to be contaminated with bacterial ring rot. The diseased seed could not be certified and was not sellable as seed. Johnson Aff. I, Exh. E. The small portion that was

sold as seed before the discovery of the bacterial ring rot proved to be disastrous. Wooten Farms, who had grown the A84180-8 variety in 2012 with record yields and pack-outs (incidentally from the same seed stock grown by Silver Creek in 2012), planted the Silver Creek seed in 2013 and had substantial yield loss, terrible pack-out, and significant rejections because the breakdown in the potatoes was substantial. *Derbidge Depo.*, p. 53, l. 14-p. 57, l. 6.

Ultimately, neither the early generation seed intended for development of future seed generations nor the third generation seed intended for future production were passable in the industry or fit for their ordinary use. Silver Creek breached express and implied warranties of merchantability and the seed potatoes did not conform to the Contract.

**B. Admitted defects in tendered goods substantially impaired the value of the whole contract.**

In addition to the foregoing issues related to warranties, express and implied, Silver Creek breached the entire contract when it tendered delivery of potato seed contaminated with bacterial ring rot. The Contract is an installment contract, as defined by Section 2-612 of the Uniform Commercial Code, because it “authorizes the delivery of goods in separate lots to be separately accepted[.]” IDAHO CODE ANN. § 28-2-612(1). Notwithstanding the installment nature of the contract, the delivery of a single load contaminated with bacterial ring rot is a breach of the whole because, as already discussed above, the presence of bacterial ring rot destroyed the value of not only the contaminated seed, but also the allegedly clean seed.



“Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole.”

IDAHO CODE ANN. § 28-2-612(3).

As discussed in more specific detail above, the value of the whole contract to Sunrain was lost because the contaminated seed potatoes could not be certified and could not be sold for commercial production and because the allegedly clean seed potatoes were ineligible for recertification and could not be grown to develop future generations of certified seed. The seed potatoes were not merchantable, not fit for their ordinary use, and not fit for their intended use. Sunrain did not receive the benefit of its bargain and if required to accept the seed potatoes tendered by Silver Creek it would have been left holding seed potatoes that could neither be sold for commercial production nor used for development of future generations of seed potatoes.

Whether a breach in one installment substantially impairs the value of the whole contract and thus amounts to a breach of the whole is a question of fact. *See e.g. Cranesville Block Co. Inc. v. Goodyear Tire & Rubber Co.*, 208 A.D.2d 1157, 1159, 617 N.Y.S.2d 951, 953 (1994). Based on Silver Creek’s failure to tender delivery of seed potatoes that were merchantable, fit for their ordinary use, or fit for their particular intended use under the Contract, there are facts from which a jury could conclude that the presence of bacterial ring rot in one or more installments impaired the value of the entire contract. There are facts supporting a conclusion that Silver Creek breached the entire contract and summary judgment is not proper.

**II. Sunrain was entitled to reject and did reject the entire seed crop.**

Because the seed potato crop raised by Silver Creek under the Contract did not conform to the Contract and because Silver Creek did not tender delivery of conforming

seed potatoes, Sunrain was entitled to reject the entire seed crop. Section 2-601 of the Uniform Commercial Code provides:

Subject to the provisions of this chapter on breach in installment contracts (section 28-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 28-2-718 and 28-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

IDAHO CODE ANN. § 28-2-601.

Section 28-2-612 provides limitations with respect to rejection of installment contracts, but those limitations are not applicable here because the presence of bacterial ring rot in the A84180-8 variety resulted in a breach of the whole contract. This is true not only because the bacterial ring rot substantially impaired the value of the whole contract, but also because the presence of bacterial ring rot made the remaining varieties ineligible for certification and thus non-merchantable and unfit for their ordinary and particular purpose. Sections 28-2-719 and 719 also have a potential impact on the right of rejection under Section 28-2-601, but they are limited in their scope to contractual modifications to remedies, primarily based upon liquidated damage and similar clauses, none of which exist in the Contract.

The allegedly clean seed potatoes could not be used for their intended purpose under the Contract, as acknowledged by Mark Johnson, and Sunrain had the right, pursuant to Section 28-2-601 to reject the seed potatoes.

Under Section 2-602 of the Uniform Commercial Code, "Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." IDAHO CODE ANN. § 28-2-602(1). Contrary to Silver Creek's assertion on the motion for partial summary judgment, there is evidence in this

case that Sunrain rejected the entire crop of seed potatoes, less those delivered to Wooten Farms, and that the rejection occurred in a reasonable time and was communicated to Silver Creek. Indeed, it appears from the evidence that Sunrain communicated the rejection to Silver Creek on more than one occasion and by multiple agents of Sunrain.

Davenport, president of Sunrain, testified on inquiry by counsel for Silver Creek, that he met with Mark Johnson and others in April 2012 and informed him that Sunrain would not take any of the seed potatoes under the contract because it was not certifiable for its intended purpose. Deposition of Mel Davenport (Davenport Depo.), p. 5, ll. 6-9; p. 8, l. 9-p. 12, l. 24.

As noted, Derbidge was authorized to speak and negotiate on behalf of Sunrain. Davenport Depo., p. 28, l. 18-p. 29, l. 2. Derbidge, business manager at Sunrain, testified that he informed Mark Johnson on multiple occasions that Sunrain would not take the seed potatoes under the contract. He testified:

Q. Okay. After that conversation with Jeff, when did you next talk to Mark Johnson?

A. You know, it wasn't until I got back. And I should have brought the dates to have in front of me. It was that first – that second week of April that I called and talked to Mark. This was after we had contacted the grower that had already received that seed and talked to them about the fact that we had had a positive ring rot test; it had come from Silver Creek, and Silver Creek had had a positive ring rot test.

That's when I called Mark and said, my understanding is that none of that seed can be recertified that was produced on that farm, and so at this moment in time, it is not something that will fit our uses under the contract. It is seed that we will have to reject as certified seed because it cannot be recertified.

Q. Okay. That was in a telephone call the second week of April?

A. Correct.

Derbidge Depo., p. 8, l. 6-p. 9, l. 1. He added that Johnson acknowledged that the seed would not be eligible for recertification, that recertification was the intent for the seed under the contract, and that because of recertification limitations that was no longer an option. *Id.*, p. 9, ll. 12-22. He further added that to minimize losses they then discussed other options for the crop since it could not be used for seed, including possible fresh pack, commercial seed, or cattle feed. *Id.*, p. 9, l. 23-p. 10, l. 7.

Derbidge further testified regarding a meeting on April 24, 2013, as follows:

Q. In that meeting on April 24, 2013, did you specifically tell Mark Johnson that Sunrain was rejecting the seed?

A. Yes. Yes, as seed. And then we would work with him to figure out how we could get it moved out. We deal in a product that doesn't get any better the longer it sits in the storage, so you have to get it moved out on the storages, and that's what we were attempting to do was to help Mark get the product moved.

Q. And it is your recollection that you specifically remember in that meeting telling Mark, look we reject your seed as seed, but we'll try to help you –

A. Yes, absolutely. We cannot use this as seed, and we will try to get it moved out from your cellars.

Q. And why were you trying to get it moved out of his cellars?

A. Because the longer you let it sit there, the more likely it is to just rot. And at that point, you got to go in there with front end loaders. Mark would have a whole big mess on his plate. We were trying to help out somebody that was a seed grower for us.

Q. And was it your understanding that once you had rejected the seed, it was no longer your responsibility of what happened in Mark's cellars?

A. Yeah. But that doesn't mean we wanted to leave him on his own. We were still trying to help Mark out.

Derbidge Depo., p. 23, l. 20-p. 24, l. 24.

Based upon the foregoing, there is evidence from which the finder of fact can conclude that Sunrain rejected the entire seed potato crop within a reasonable time and seasonably notified Silver Creek of that rejection. Per Derbidge's testimony, he informed Johnson of the rejection by phone within a week of learning of the non-conformity of the seed potato crop and in person within less than a month. Per Davenport's testimony, he also informed Johnson of the rejection in person within less than a month of discovery of the non-conformity.

Because Sunrain had the right to reject the seed potato crop and did reject the crop by communicating that rejection to Silver Creek's agent, summary judgment finding that Sunrain is responsible for the Contract price for the seed potatoes is inappropriate. The record is now amply augmented with new evidence that, at minimum, creates material issues of fact as to Sunrain's rejection of the seed potatoes grown by Silver Creek.

On its motion for partial summary judgment, Silver Creek discussed the seed potatoes in distinct and separate categories. One included those contaminated potatoes of the A84180-8 variety taken by Sunrain before discovery of the bacterial ring rot and delivered to Wooten Farms for use in commercial production. The second included those contaminated potatoes taken by Sunrain after discovery of the bacterial ring rot and delivered as cattle feed. The third category are those allegedly clean seed potatoes which Sunrain declined to take delivery after it was learned that they would not be eligible for recertification as contemplated by the Contract. The effect of rejection varies with respect to each category and each will be discussed in turn in reverse order.

(1) Category Three: Clean potatoes which Sunrain which Sunrain declined to accept or take delivery of. With respect to the allegedly clean seed of which Sunrain declined to take deliver, the rejection resolved the issues and closed the transaction.

Section 2-602 of the Uniform Commercial Code provides, in pertinent part:

(2) Subject to the provisions of the two following sections on rejected goods (sections 28-2-603 and 28-2-604), (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of section 28-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but (c) the buyer has no further obligations with regard to goods rightfully rejected.

IDAHO CODE ANN. § 28-2-602(2). Sunrain did not exercise any ownership in the seed potatoes after rejection and never took physical possession of the seed potatoes. As discussed in more detail above, the seed potatoes were non-conforming and were rightfully rejected. Once the non-conforming seed potatoes were rejected, Sunrain had no further obligation.

(2) Category Two: Infected potatoes sold as cattle feed. With respect to those contaminated potatoes taken by Sunrain, they were released to Sunrain after rejection and without being “inspected, tagged, sealed, and certified” as they would have been required to be if tendered under the contract without rejection. Johnson Aff. I, Exh. D. The circumstances and the evidence suggests that these seed potatoes were not released to Sunrain as part of the Contract, but as a result of Sunrain’s efforts to help Silver Creek clear its storage. Derbidge testified of Johnson and the removal of seed potatoes as cattle feed:

He and I traded a few text messages as we were moving things out for cattle feed and finishing cleaning up storage. So Mark and I actually did

the cattle feed in conjunction. He had an individual that came in and took product for cattle feed as well, that was local. When that filled up, that is when we were pulling it out to a more long distance – just – at the time the rationale was that we would have higher return – a higher potential return back to Mark by having it done locally.

Derbidge Depo., p. 38, ll. 10-19. Sunrain did not exercise ownership after rejection, but merely took possession of the non-conforming seed potatoes with Silver Creek's awareness and consent to deliver them as cattle feed for Silver Creek's benefit. Sunrain's actions with respect to these seed potatoes was consistent with Section 28-2-603, which provides that a merchant buyer, when in possession of rejected goods, has a duty to "follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for seller's account if they are perishable or threaten to decline in value speedily." IDAHO CODE ANN. § 28-2-602(1). The evidence supports a finding of a cooperative effort to move the non-conforming seed potatoes as cattle feed with Sunrain following reasonable instructions from Silver Creek. At a minimum, however, Sunrain made reasonable efforts to sell the perishable seed potatoes for Silver Creek's account as contemplated by Section 28-2-602. Sunrain may have an obligation to pay Silver Creek the value of the potatoes as cattle feed, but it rightfully rejected the seed potatoes and has no obligation with respect to the Contract price.

(3) Category One: Infected potatoes sold to Wooten Farms. Finally, with respect to those potatoes that were "inspected, tagged, sealed, and certified" as required by the Contract and sold to the Wootens, but later proved to be contaminated, Sunrain had the legal right to reject those seed potatoes or revoke its acceptance, notwithstanding the fact they had already been planted. See IDAHO CODE ANN. § 28-2-608. Nevertheless, Sunrain

opted not to take that course and has, as the Court found during the hearing on the motion for partial summary judgment, already paid the full contract price for those seed potatoes.

Sunrain paid full contract price for the potatoes sold to Wooten farms and as discussed above, rightfully rejected all other potatoes. It has no obligation to pay the contract price for potatoes that did not conform to the contract and were rejected.

Accordingly, the partial summary judgment granted by this Court is inconsistent with the facts and controlling law.

**III. Silver Creek is not prejudiced by consideration of the new evidence establishing Sunrain's rejection of the seed potatoes.**

Within days of the Court ruling on the Motion for Partial Summary Judgment from the bench, Silver Creek's counsel took the depositions of Aron Derbidge and Mel Davenport. In those depositions, Silver Creek's counsel elicited in detail the very evidence which the Court had originally held was lacking in ruling that Sunrain had failed to present sufficiently detailed evidence of rejection of the seed potatoes. Based upon the newly submitted deposition testimony there is now before the Court evidence creating a triable issue on whether the seed potatoes had been rejected by Sunrain.

The Court, in ruling on the Motion to Strike Aron Derbidge's Affidavit, opined that Derbidge's affidavit lacked specificity with regard to his testimony that Sunrain had in fact rejected the seed potatoes. In particular, the Court indicated that it needed more foundational information as to Derbidge's authority speak to on behalf of Sunrain and the details surrounding the communications with Silver Creek articulating the rejection of the seed potatoes. The excerpted testimony of Derbidge and Davenport more than adequately meets the evidentiary requirements laid out by the Court. Since this testimony was elicited by Silver Creek's counsel within the discovery period, Silver Creek cannot now

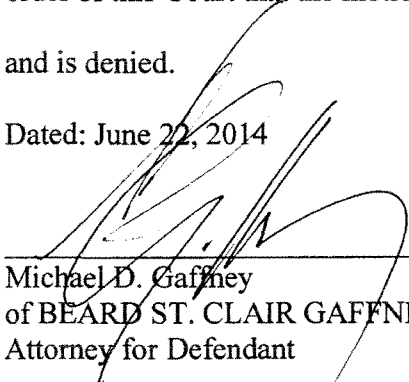


claim prejudice. Pursuant to *Fragnella, supra*, the Court must consider the new evidence and authority bearing on the correctness of the interlocutory order.

### CONCLUSION

For the foregoing reasons, Sunrain respectfully requests the Court's reconsideration of its prior ruling on the motion for summary judgment and entry of an order of this Court that the motion for partial summary judgment has been reconsidered and is denied.

Dated: June 22, 2014



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Michael D. Gaffney  
of BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

## CERTIFICATE OF SERVICE

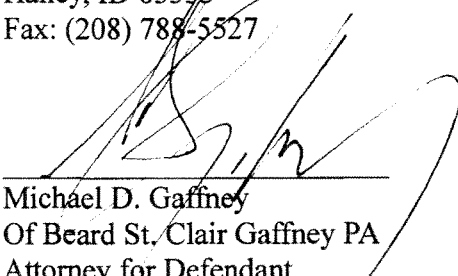
I certify I am a licensed attorney in the state of Idaho and on June 22, 2013, I served a true and correct copy of the MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669

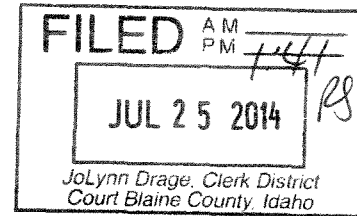
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Blaine County Courthouse  
201 2<sup>nd</sup> Avenue S., Ste. 106  
Hailey, ID 83333  
Fax: (208) 788-5527

☒ U.S. Mail      ☐ Hand-delivered      ☐ Facsimile

  
\_\_\_\_\_  
Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant

Michael D. Gaffney, ISB No. 3558  
BEARD ST. CLAIR GAFFNEY PA  
2105 Coronado Street  
Idaho Falls, Idaho 83404-7495  
Telephone: (208) 523-5171  
Facsimile: (208) 529-9732  
Email: gaffney@beardstclair.com



Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

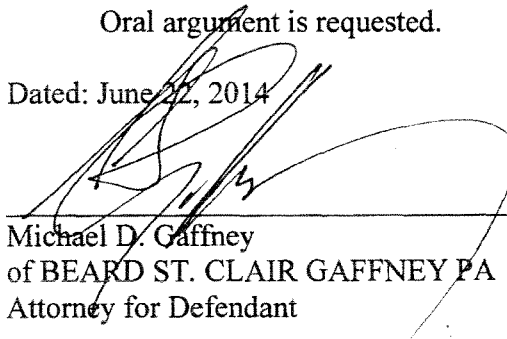
Case No.: CV-2013-644

MOTION TO RECONSIDER

Sunrain Varieties LLC (Sunrain), through its attorneys of record, respectfully moves this Court for an order reconsidering its granting the Amended Motion for Partial Summary Judgment filed by Silver Creek Seed, LLC (Silver Creek). The basis for this motion is set forth in the memorandum and affidavit filed contemporaneously herewith.

Oral argument is requested.

Dated: June 22, 2014

  
Michael D. Gaffney  
of BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on June 22, 2013, I served a true and correct copy of the MOTION TO RECONSIDER on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669



U.S. Mail



Hand-delivered



Facsimile

Blaine County Courthouse  
201 2<sup>nd</sup> Avenue S., Ste. 106  
Hailey, ID 83333  
Fax: (208) 788-5527



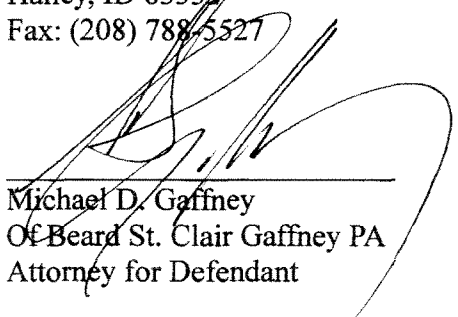
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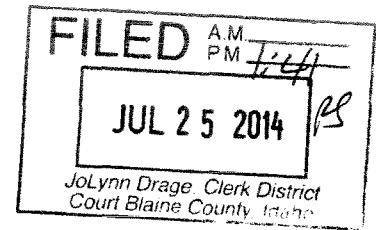
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Facsimile

  
\_\_\_\_\_  
Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant

Michael D. Gaffney, ISB No. 3558  
BEARD ST. CLAIR GAFFNEY PA  
2105 Coronado Street  
Idaho Falls, Idaho 83404-7495  
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Facsimile: (208) 529-9732  
Email: gaffney@beardstclair.com



Attorney for Respondent

**DISTRICT COURT FIFTH JUDICIAL DISTRICT  
BLAINE COUNTY IDAHO**

SILVER CREEK SEED, LLC, an Idaho  
limited liability company,

Plaintiff-Counterdefendant,

vs.

SUNRAIN VARIETIES LLC, a Delaware  
limited liability company,

Defendants-Counterclaimant.

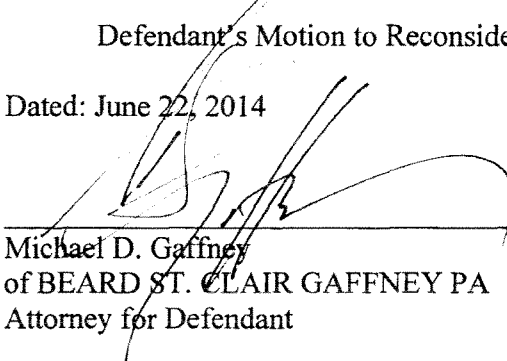
Case No.: CV-2013-644

NOTICE OF HEARING

All parties will please take notice that a hearing has been set before the Honorable  
Robert J. Elgee at the Blaine County Courthouse, 201 2<sup>nd</sup> Avenue South, Hailey, ID, on  
Monday, August 25, 2014 at 3:00 p.m. on the following matters:

Defendant's Motion to Reconsider

Dated: June 22, 2014

  
Michael D. Gaffney  
of BEARD ST. CLAIR GAFFNEY PA  
Attorney for Defendant

CERTIFICATE OF SERVICE

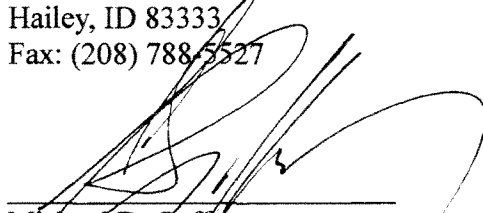
I certify I am a licensed attorney in the state of Idaho and on June 22, 2013, I served a true and correct copy of the NOTICE OF HEARING on the following by the method of delivery designated below:

Andrew B. Wright  
Wright Brothers Law Office  
PO Box 226  
Twin Falls, ID 83303  
Fax: (208) 733-1669

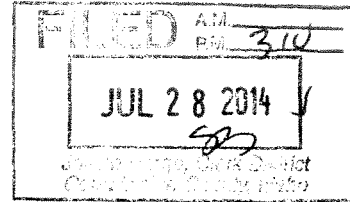
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☒ U.S. Mail      ☐ Hand-delivered      ☐ Facsimile

  
\_\_\_\_\_  
Michael D. Gaffney  
Of Beard St. Clair Gaffney PA  
Attorney for Defendant

Andrew B. Wright [ISB No. 6812]  
WRIGHT BROTHERS LAW OFFICE, PLLC  
1166 Eastland Drive North, Suite A  
P.O. Box 226  
Twin Falls, ID 83303  
Telephone No. (208) 733-3107  
Facsimile No. (208) 733-1669  
e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )  
 )  
Plaintiff/Counterdefendant, )  
vs. )  
 )  
SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

Case No. CV-2013-644

**2<sup>nd</sup> MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

COMES NOW Plaintiff/Counterdefendant Silver Creek Seed, LLC ("Silver Creek"), by and through its attorney Andrew B. Wright of Wright Brothers Law Office, PLLC, and hereby submits this 2<sup>nd</sup> Motion for Partial Summary Judgment. This motion is supported by Silver Creek's filings and pleadings in this matter, including without limitation, the following:

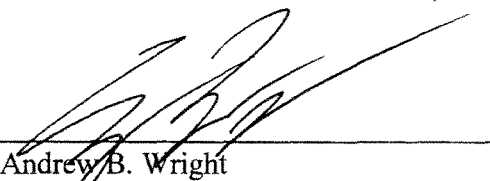
- Affidavit of Mark Johnson in Support of 2<sup>nd</sup> Motion for Partial Summary Judgment;
- Affidavit of Mark Johnson in Support of Motion for Partial Summary Judgment; and
- Affidavit of Mark Johnson in Support of Reply to Sunrain Varieties, LLC's Opposition to Summary Judgment.

The Court previously granted Silver Creek partial summary judgment establishing that Sunrain Varieties, LLC ("Sunrain") is liable to Silver Creek under the parties' *Blanket Variety Contract* (the "Contract") for the 1) seed potato lots grown by Silver Creek that did not test positive for bacterial ring rot (the "Clean Potatoes"), and 2) the 84180 lot of seed potatoes that Sunrain took delivery of and then sold to a third-party prior to the discovery of bacterial ring rot (the "84180 Potatoes"). The purpose of this motion for partial summary judgment is to determine the Contract amount owed for the lots containing the Clean Potatoes and 84180 Potatoes, based upon the quantity and rate for each lot. This motion does not seek to address any amounts previously paid by Sunrain or the Contract amount owed for any other potatoes.

Oral argument is requested.

DATED this 25 day of July, 2014.

WRIGHT BROTHERS LAW OFFICE, PLLC

By:   
\_\_\_\_\_  
Andrew B. Wright  
Attorneys for Plaintiff/Counterdefendant

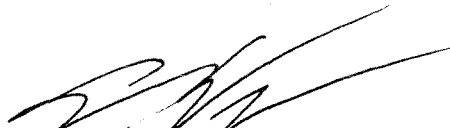


**CERTIFICATE OF SERVICE**

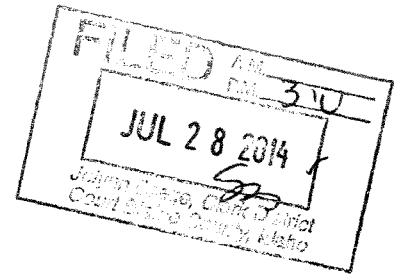
Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 26 day of July, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
☐ Express Mail  
☐ Hand Delivery  
☐ Facsimile- (208) 529-9732  
☒ E-mail

  
\_\_\_\_\_  
Andrew B. Wright

Andrew B. Wright [ISB No. 6812]  
WRIGHT BROTHERS LAW OFFICE, PLLC  
1166 Eastland Drive North, Suite A  
P.O. Box 226  
Twin Falls, ID 83303  
Telephone No. (208) 733-3107  
Facsimile No. (208) 733-1669  
e-mail: [AWright@WrightBrothersLaw.Com](mailto:AWright@WrightBrothersLaw.Com)



Attorneys for Plaintiff/Counterdefendant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF BLAINE

SILVER CREEK SEED, LLC, an Idaho )  
limited liability company, )  
 )  
Plaintiff/Counterdefendant, )  
vs. )  
 )  
SUNRAIN VARIETIES, LLC, a Delaware )  
limited liability company, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

Case No. CV-2013-644

**AFFIDAVIT OF MARK  
JOHNSON IN SUPPORT OF  
2<sup>nd</sup> MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

STATE OF IDAHO )  
 )ss.  
County of Blaine )

MARK JOHNSON, being first duly sworn upon oath, deposes and states:

1) My name is Mark Johnson. I am a member of Silver Creek Seed, LLC ("Silver Creek"). For the Silver Creek potatoes that are the subject of this litigation, I was personally involved with these potatoes from the time they were grown until they left Silver Creek's cellars.

2) I have personal knowledge of the factual information contained herein, and am over the age of 18 years and competent to testify to the facts as stated herein.

3) This affidavit is made upon personal knowledge setting forth facts that I believe to be true and would be admissible in evidence.

4) Attached hereto as Exhibit A is a true and correct copy of the *Blanket Variety Contract* (the "Contract") entered into between Silver Creek and Sunrain Varieties, LLC ("Sunrain").

5) In 2012, Silver Creek grew Generation 3 Laura seed potatoes pursuant to the Contract, which did not test positive for *Clavibacter michiganensis* subs. *Spedonicus* (referred to as "bacterial ring rot"). Pursuant to the Contract, Silver Creek grew a total of 10,294.0 cwt (using the weight of the potatoes when removed from storage) of the Generation 3 Laura on 27 acres, which resulted in an average yield per acre of 381.3 cwt. Attached hereto as Exhibit B are copies of the bills of lading for these potatoes.

6) In 2012, Silver Creek grew Generation 3 Allians seed potatoes pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 11,079.8 cwt (using the weight of the potatoes when removed from storage) of the Generation 3 Allians on 27 acres, which resulted in an average yield per acre of 410.4 cwt. Attached hereto as Exhibit C are copies of the bills of lading for these potatoes.

7) In 2012, Silver Creek grew Generation 3 Red Fantasy seed potatoes pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 4,033.8 cwt (using the weight of the potatoes when removed from storage) of the Generation 3 Red Fantasy on 14.2 acres, which resulted in an average yield per acre of 284.1 cwt. Attached hereto as Exhibit D are copies of the bills of lading for these potatoes.

8) In the above-described Exhibit D, please note Bill of Lading No. 1634, which includes a load of Generation 3 Red Fantasy variety potatoes and some Marriette variety of

potatoes (the Mariette variety potatoes were not subject to the Contract). The load consisted of 379.2 cwt of Generation 3 Red Fantasy variety potatoes and 24.2 cwt of Marriette variety potatoes, for a total load weight of 403.40 cwt. This has been accurately accounted for in the total of Generation 3 Red Fantasy listed in the above-described paragraph.

9) In 2012, Silver Creek grew Generation 3 Annabelle seed potatoes pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 8,825.6 cwt (using the weight of the potatoes when removed from storage) of the Generation 3 Annabelle on 24.1 acres, which resulted in an average yield per acre of 366.2 cwt. Attached hereto as Exhibit E are copies of the bills of lading for these potatoes.

10) In the above-described Exhibit E, please note the load of potatoes evidenced by Bill of Lading No. 1992, which consisted of Generation 3 Annabelle variety potatoes. A typographical error was made on the bill of lading. Silver Creek planned to ship the Generation 3 Annabelle variety seed potatoes on May 20, 2013, and the Generation 2 Annabelle potatoes the next day. Bill of Lading No. 1992 was for the first load of potatoes shipped by Silver Creek on May 21, 2013, so Silver Creek's employee writing up the bill of lading presumably assumed it was a shipment of Generation 2 Annabelle potatoes, as those were the seed potatoes scheduled to be shipped that day. It was only well after the load had departed Silver Creek's storages that it was noticed that Bill of Lading No. 1992 contained the error regarding the generation of the Annabelle potatoes. This has been accurately accounted for in the total of Generation 3 Annabelle listed in the above-described paragraph.

11) In 2012, Silver Creek grew Generation 2 Red Fantasy seed potatoes pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 8,492.8 cwt (using the weight of the potatoes when removed from storage)

of the Generation 2 Red Fantasy. Attached hereto as Exhibit F are copies of the bills of lading for these potatoes.

12) In 2012, Silver Creek grew Generation 2 Laura seed potatoes pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 9,828.2 cwt (using the weight of the potatoes when removed from storage) of the Generation 2 Laura. Attached hereto as Exhibit G are copies of the bills of lading for these potatoes.

13) In the above-described Exhibit G, please note that Bill of Lading No. 1958 contains an error. The bill of lading has 37,180 written in as the tare weight; however, the actual scale ticket (located in the upper-left corner of the bill of lading) reveals that the tare weight should actually be 37,280. This has been accurately accounted for in the total of Generation 2 Laura listed in the above-described paragraph.

14) In 2012, Silver Creek grew Generation 2 Annabelle seed potatoes grown by Silver Creek pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 1,589.0 cwt (using the weight of the potatoes when removed from storage) of the Generation 2 Annabelle. Attached hereto as Exhibit H are copies of the bills of lading for these potatoes.

15) In 2012, Silver Creek grew Generation 2 Carrera seed potatoes pursuant to the Contract, which did not test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 535.0 cwt (using the weight of the potatoes when removed from storage) of the Generation 2 Carrera. Attached hereto as Exhibit I are copies of the bills of lading for these potatoes.

16) In 2012, Silver Creek grew Generation 3 84180 seed potatoes pursuant to the Contract, some of which did test positive for bacterial ring rot. Pursuant to the Contract, Silver Creek grew a total of 5,566.8 cwt (using the weight of the potatoes when removed from storage) of the 84180 that Sunrain took delivery of and then sold to a third-party prior to the discovery of bacterial ring rot. These potatoes resulted in an average yield per acre of 269.6 cwt. Attached hereto as Exhibit J are copies of the bills of lading for these potatoes.

17) For the above-described and attached bills of lading, Silver Creek would weigh each incoming empty truck picking up a load of potatoes and re-weigh that truck after it was loaded with the outgoing potatoes. From those weights, the quantity of each load of bulk potatoes was figured and written on an invoice or bill of lading—which also specified the variety of potatoes comprising that load—signed by the truck’s driver before leaving Silver Creek’s storages.

18) Sunrain’s total obligation under the Contract for the potatoes that were not infected with bacterial ring rot was \$977,307.00, which included the Generation 3 Laura (\$138,969.00), Generation 3 Allians (\$149,577.30), Generation 3 Red Fantasy (\$58,490.10), Generation 3 Annabelle (\$119,145.60), Generation 2 Red Fantasy (\$212,320.00), Generation 2 Laura (\$245,705.00), Generation 2 Annabelle (\$39,725.00), and Generation 2 Carrera (\$13,375.00).

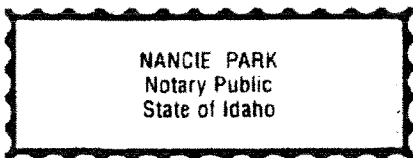
19) Sunrain’s total obligation under the Contract for the 84180 lot infected with bacterial ring rot that Sunrain took delivery of and then sold to a third-party (prior to the discovery of bacterial ring rot) is \$80,718.60.

Further your affiant sayeth naught.

DATED this 25 day of July, 2014.

By: Mark Johnson  
Mark Johnson

SUBSCRIBED and SWORN to before me this 25<sup>th</sup> day of July, 2014.



Nancie Park  
NOTARY PUBLIC FOR IDAHO  
Residing at Picabo, Id  
My Commission Expires: 7/22/19

**CERTIFICATE OF SERVICE**

Andrew B. Wright, a resident attorney of the State of Idaho, hereby certifies that on the 25 day of July, 2014, he served a true and correct copy of the within and foregoing document upon the following:

Michael D. Gaffney  
BEARD ST. CLAIR GAFFNEY P.A.  
2105 Coronado Street  
Idaho Falls, ID 83404-7495

☒ U.S. Mail, postage prepaid  
☐ Express Mail  
☐ Hand Delivery  
☐ Facsimile- (208) 529-9732  
☒ E-mail

Andrew B. Wright  
Andrew B. Wright

# **EXHIBIT A**



# Sunrain Potato Varieties, L.L.C. Seed Potato Grower Contract

## *Blanket Variety Contract*

This agreement (hereinafter referred to as "Agreement") is made and entered into this 10th day of May, 2012 by and between Sunrain Potato Varieties, L.L.C. a Delaware Limited Liability Company, hereinafter referred to as "Sunrain", and Silver Creek Seed L.L.C. Seed Farms, an Idaho partnership, hereinafter referred to as "Silver Creek Seed L.L.C.".

**Whereas**, Sunrain wishes to secure a secure, clean source of certified potato seed of Proprietary varieties, for Sunrain's/ 2013 commercial planting seasons, AND

**Whereas**, Silver Creek Seed L.L.C. is in the business to supply certified potato seed;

**Now, Therefore**, in consideration of the covenants and conditions contained herein, Sunrain and Silver Creek Seed L.L.C. do agree to the following:

- 1) **TERM:** The Term of this agreement shall be for Silver Creek Seed L.L.C.'s seed crop grown in 2012, in or around Blaine County for delivery to commercial growers in December 2012, culminating in last deliveries in May 2013. This contract will be renewable for 2013-2014, upon renegotiation of seed quality and yield in the event of a pricing change. In addition this will be a rolling, 3 Year contract depending on annual evaluation of the program, varieties, and pricing structure. Parties will endeavor to meet pricing laid forward based on costing of early generation seed lots incoming to Silver Creek Seed. There will be two down payments on the seed for delivery in commercial years beginning in the fall of 2012. The dates will be December 31, March 1 for \$2.00/cwt for December payment and \$3.00 for the March payment. The final payment is due 30 days after shipping, and Silver Creek will invoice Sunrain for both down payments, and invoices regarding shipments. In addition, Sunrain will rent 1 storage facility beginning in 2012 Fall. The pricing will be .55 cents per cwt and the payments will be 1/3, 1/3, and 1/3. The payment schedule on the storage will be Oct 1, Feb, 1, and final payment 30 days after storage is empty. Silver Creek will take care of power, and oversee management of the storage, reporting to Sunrain any issues it deems necessary for proper seed storage. In addition, the building will carry insurance to ensure both parties that the product is covered by necessary insurance for the contents.

- 2) **PRICE and QUANTITY:** For the seed years 2012, 2013-commercial year 2012-2013, Silver Creek Seed L.L.C. agrees to sell Generation 3 Proprietary seed potatoes and Sunrain agrees to purchase all cwt Generation 3 seed potatoes. Silver Creek Seed L.L.C. also will not be able to sell these varieties to any other entity other than Sunrain due to Sunrain's exclusive ownership of the varieties. Generation 3 seed will be sold to Sunrain at \$ 13.50 per cwt. In the event that the yield falls below 350 cwt the price will go to \$14.50/cwt. All prices are loaded bulk

delivery aboard Sunrain's trucks F.O.B. Silver Creek Seed L.L.C.'s storages. Silver Creek Seed L.L.C. shall cooperate with Sunrain's delivery schedules. All acreage will be GPS monitored and volume to back up yield calculations will be done by scaled out weights. Any Generation 2 seed sold to Sunrain will be priced at \$25.00 dollars/cwt and this price is based on 2012 incoming seed prices. Future pricing will depend on incoming early generation pricing on the Generation 2 seed.

3) **SIZE:** Size of seed shall be 1-1/2 oz. Minimum and 9.5 oz. Maximum, with a 5% tolerance on both size limits. Seed over the maximum size or under the minimum will be appraised to packing quality by Sunrain at harvest time and be considered to be packed at Potandon's fresh packing operation at Idaho Select or Walters's Produce, at either location in Idaho. The price will be \$6/cwt of bulk product. In no event shall seed potatoes exceed 5% on either minimum or maximum size be accepted. Sunrain reserves the right to refuse/reject any loads exceeding 5% on either minimum or maximum sizes.

4) **SEED QUALITY STANDARDS:** The seed shall conform to Idaho Crop Improvement Association standards for the generation being delivered to Sunrain, and must meet all certification requirements of the State of Idaho. All seed potatoes grown pursuant to this Agreement shall be inspected in the fields and storages by the appropriate inspectors. All seed potatoes shall be free from frost damage. Each load will be inspected, tagged, sealed, and certified prior to departure from Silver Creek Seed L.L.C.'s storages by the appropriate state inspection service. Each load will have an inspection certificate upon departure for Sunrain's destination. No advance payments shall be due with the exception of a down payment due 30 days after harvest. Silver Creek Seed L.L.C. will provide Sunrain with proof of said potatoes passing all certifications, and field inspections, due at the time of delivery or after final inspections. In addition, Silver Creek Seed L.L.C. agrees to follow Sunrain/Potandon/Solanum Seed Grower protocol "Attachment A". Also for all seed lots every attempt will be taken to allow seed to pass all state certification requirements as well as Phytosanitary requirements necessary for shipping into Canada. This will include PCN testing to USDA/CFIA guidelines and Columbia Basin Root Knot and Potato Rot Nematode testing. In addition 400 tuber samples will be sent to a USDA approved testing facility for Bacterial Ring Rot. Silver Creek Seed L.L.C. will attempt to make its seed potatoes make US Fresh Grade in the growing of the seed crops.

5) **SEED EXCLUSIVITY:** Silver Creek Seed L.L.C. understands that all varieties supplied by Sunrain are exclusive to Sunrain and cannot be sold in any method to other potato producers without Sunrain's written consent. In addition, Silver Creek Seed L.L.C. agrees to Solanum's Grower Agreement concerning the exclusivity of the varieties. (See Attachment "B")

6) **PAYMENT:** Upon proof of seed quality standards, full payment shall be made 30 days after delivery of said variety.

7) **ATTORNEY FEES-VENUE; APPLICABLE LAW:** Should any litigation be commenced between the parties concerning this Agreement or the rights and duties of the parties

in relation thereto, the action shall be brought exclusively in Bonneville County, Idaho and the prevailing party shall be entitled to recover actual attorney fees and costs incurred in such litigation. It is further agreed that either party may seek immediate injunctive relief for the performance of any term or condition of this Agreement. This Agreement shall be governed in accordance with the laws of the state of Idaho.

8) **ASSIGNMENT-SUCCESSORS:** This Agreement shall not be subcontracted, transferred, assigned or otherwise succeeded to, nor shall the performance of any of the duties set forth above be delegable by either party, without prior written consent of the other party. In the event of an assignment by consent, this Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of both parties. This Agreement shall not be assignable by operation of law.

9) **WAIVER OF BREACH:** The failure of either party to insist upon strict performance of any of the covenants and agreements contained herein shall not be construed to be a waiver or relinquishment of any such options or rights or of any other covenants or agreements, but the same shall be and remain in full force and effect.

10) **FORCE MAJEURE:** Silver Creek Seed L.L.C. and/or Sunrain's obligations under this Agreement shall be abated in the event or by virtue of acts of God, war, civil unrest, or other similar cause or event which materially affects the applicable party's ability to perform.

11) **NOTICES:** Any notice required to be given by any party to the other shall be deposited in the United States mail, registered or certified mail, return receipt requested, postage prepaid, addressed to Silver Creek Seed L.L.C. Seed Farms, PO Box 646 Picabo, Idaho 83348, or to Sunrain Potato Varieties, L.L.C., Attention Mel Davenport, 1210 Pier View Drive, Idaho Falls, Idaho 83404.

12) **CONFIDENTIALITY:** Both parties mutually agree not to disclose any of the terms of this Agreement to any third party as long as the Agreement remains in effect, provided that Silver Creek Seed L.L.C. may disclose terms for the sole purpose of obtaining financing so long as the financial institution(s) agree(s) to the terms of this confidentiality clause.


13) **WARRANTY AND LIMITATIONS OF LIABILITY:** Silver Creek Seed L.L.C. warrants that the potatoes sold hereunder, (i) shall be conveyed free and clear of all liens, encumbrances, (ii) are of merchantable quality as set forth herein, (iii) are fit for their intended use, and (iv) conform to the description and meets or exceeds the quality standards contained herein above. Silver Creek Seed L.L.C. shall indemnify and hold Sunrain harmless from all crop liens, security interests, debts, obligations and encumbrances and all costs and damages arising therefrom, including reasonable attorneys' fees and costs. As an additional remedy, Sunrain may include as additional payees on any payment checks payable to Silver Creek Seed L.L.C.; (a) anyone claiming any interest in the seed or proceeds purchased under this contract; (b) as of the time of each payment which may be due hereunder, any other person or company which notifies Sunrain, or records or files its notice of its claim of interest in the seed or proceeds therefrom.

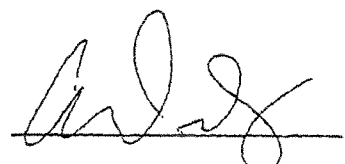
Sunrain shall have no obligation to verify or consider the validity of such claims or notifications, and may include any claimant's name on such checks regardless of the validity of the claim. Silver Creek Seed L.L.C. makes no other warranties, express or implied, not otherwise contained herein. Consequential and incidental damages are hereby expressly excluded.

14) **ENTIRE AGREEMENT:** This instrument contains the entire Agreement between the parties and supersedes any prior agreement, written or oral, between them and shall not be modified except by an agreement in writing executed by all parties. This Agreement shall be amended only by written instruction signed by all parties. Headings of this Agreement are for convenience only and are not part of the Agreement and do not in any way limit or amplify the terms or provisions of the Agreement.

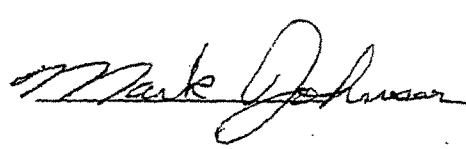
15) **WARRANTIES AND REPRESENTATIONS:** Each party warrants and represents to the other that it has the legal authority to enter into, execute and perform this Agreement, which each party is duly organized and in good standing under applicable law, and that the execution or performance of this Agreement shall not violate or breach any third party agreement or other obligation.

*Sunrain Potato Varieties, L.L.C.*

By:   
Its: VP Sales/OPS  
Date: 5/10/2012

By:   
Its: Business Manager  
Date: 5-10-2012

*Silver Creek Seed L.L.C.*

By:   
Its: President  
Date: 5-10-2012

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

## **EXHIBIT B**

# INVOICE

P.O. Box 646 • Picabo, ID 83348  
 (208) 788-3664 • Fax (208) 578-7806  
 markj@hughes.net

1868

M Heath Load # 1

State \_\_\_\_\_ Trailer License \_\_\_\_\_ State \_\_\_\_\_

and the shipper acknowledges delivery to the carrier of the commodity,  
 ed below which carrier shall carry and deliver to the destination pre-  
 ied. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND  
 BED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.  
 ABOVE INFORMATION.

FROM: SILVER CREEK SEED, LLC.  
 LOCATION: PICABO, IDAHO  
 CONTACT: MARK JOHNSON (208) 280-5213  
 SHIPPED BY:

TO: M+M Heath Farms  
 LOCATION: Buhl, ID  
 FOR ACCT. OF: m + m / SunRain  
 REC'D BY:

DATE: 4/27/13  
 SCALE TICKET: 6548  
 GROSS: 21280  
 TARE: 14500  
 NET: 6780

DATE:  
 SCALE TICKET:  
 GROSS:  
 TARE:  
 NET:

BILL OF LADING #

SEED POTATOES

6-3  
 LOT#: 83120018  
 VARIETY: Louisa

# BILL OF LADING

SILVER CREEK SEED

P.O. Box 646 • 19051 Hwy 20

Picabo, ID 83348

(208) 788-3664 • Fax (208) 578-7806

markj@hughes.net

1928

05/10/2013 09:01  
TICKET NUMBER 6646

FROM : COW CHOW  
TO : IDA GOLD FARMS

VEHICLE : 409  
WT. IN : 36,100  
WT. OUT : 99,700  
=====

NET WT. : 63,600

Tons 31.800

Spes Comm Load #  
Truck # 118  
State Trailer License State

ATTACH THIS COPY TO  
PAPER WORK AND  
LEAVE IN MAILBOX

the shipper acknowledges delivery to the carrier of the commodity,  
below which carrier shall carry and deliver to the destination pre-  
CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND  
CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.  
VE INFORMATION.

FROM: SILVER CREEK SEED, LLC.	TO: Cow Chow
LOCATION: PICABO, IDAHO	LOCATION: Cow Chow
CONTACT: MARK JOHNSON (208) 280-5213	FOR ACCT. OF: Cow Chow
SHIPPED BY:	REC'D BY:
DATE: 5/10/13	DATE: Laura's
SCALE TICKET: 6646	SCALE TICKET: Laura's
GROSS: 99,700	GROSS: 6" sprouts
TARE: 36,100	TARE: 6" sprouts
NET: 63,600	NET: 6" sprouts

PURCHASE ORDER #

SEED POTATOES

Lot#:

VARIETY:

# BILL OF LADING

SILVER CREEK SEED

P.O. Box 646 • 19051 Hwy 20

Picabo, ID 83348

(208) 788-3664 • Fax (208) 578-7806

markj@hughes.net

1933

05/10/2013 12:18  
TICKET NUMBER 6655

FROM : COW CHOW  
TO : IDA GOLD FARMS

VEHICLE : 409  
WT. IN : 35,940  
WT. OUT : 95,700  
=====

NET Wt. : 59,760

Tons 25.880

ATTACH THIS COPY TO  
PAPER WORK AND  
LEAVE IN MAILBOX

W. CHOW Load # 2  
Truck # \_\_\_\_\_  
State \_\_\_\_\_ Trailer License \_\_\_\_\_ State \_\_\_\_\_

and the shipper acknowledges delivery to the carrier of the commodity,  
d below which carrier shall carry and deliver to the destination pre-  
ed. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND  
ED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.  
ABOVE INFORMATION.

FROM: SILVER CREEK SEED, LLC.	TO: SOME FARM
LOCATION: PICABO, IDAHO	LOCATION: JEROME, ID
CONTACT: MARK JOHNSON (208) 280-5213	FOR ACCT. OF:
SHIPPED BY:	REC'D BY:
DATE: 5/10/13	DATE: <del>5/10/13</del>
SCALE TICKET: 6655	SCALE TICKET: <del>6655</del>
GROSS: 35940	GROSS: <del>35940</del>
TARE: 95700	TARE: <del>95700</del>
NET: 59760	NET: <del>59760</del>

PURCHASE ORDER #

SEED POTATOES

LOT#:

VARIETY:

Cow Chow



Figure 1. Schematic representation of the experimental design. The subjects were divided into two groups: the control group (CG) and the experimental group (EG). The CG was exposed to a control environment (CE) and the EG was exposed to an experimental environment (EE). The EE was designed to simulate a real-world environment with various stimuli (e.g., visual, auditory, and olfactory) and tasks (e.g., navigation, decision-making, and communication). The subjects were exposed to the EE for a period of 24 hours. The results of the experiment are shown in the table below.

1939

markj@hughes.net

Tons 31.420

and the shipper acknowledges delivery to the carrier of the commodity, and below which carrier shall carry and deliver to the destination specified. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND ALL LOST OR DAMAGED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.

SHIPPER IS RESPONSIBLE FOR PROVIDING ABOVE INFORMATION.

**PURCHASE ORDER #**

VARIETY:

# BILL OF LADING

SILVER CREEK SEED

P.O. Box 646 • 19051 Hwy 20

Picabo, ID 83348

(208) 788-3664 • Fax (208) 578-7806

markj@hughes.net

1940

05/13/2013 12:01  
TICKET NUMBER 6675

FROM : COW CHOW  
TO : IDA GOLD FARMS

VEHICLE : 409  
WT. IN : 35,940  
WT. OUT : 98,500  
=====

NET Wt. : 62,560

Tons 31.280

Mark Johnson Load # 118  
Truck # 118  
State Id Trailer License Id State Id

and the shipper acknowledges delivery to the carrier of the commodity,  
d below which carrier shall carry and deliver to the destination pre-  
ed. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND  
ED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.

KEEP THIS COPY FOR YOUR RECORDS

SHIPPER IS RESPONSIBLE FOR PROVIDING ABOVE INFORMATION.

FROM: SILVER CREEK SEED, LLC.	TO:
LOCATION: PICABO, IDAHO	LOCATION: <u>Jerome Id</u>
CONTACT: MARK JOHNSON (208) 280-5213	FOR ACCT. OF:
SHIPPED BY:	REC'D BY:
DATE: <u>5/13/13</u>	DATE:
SCALE TICKET: <u>6675</u>	SCALE TICKET:
GROSS: <u>98 500</u>	GROSS:
TARE: <u>35 940</u>	TARE:
NET: <u>62 560</u>	NET:

PURCHASE ORDER #

SEED POTATOES

LOT#:

VARIETY:

Mark Johnson  
Chow  
Laura 197

# BILL OF LADING

SILVER CREEK SEED

P.O. Box 646 • 19051 Hwy 20

Picabo, ID 83348

1941

(208) 788-3664 • Fax (208) 578-7806

markj@hughes.net

05/14/2013 07:55  
TICKET NUMBER 6685

FROM : CON CHOW  
TO : IDA GULD FARMS

VEHICLE : 409  
WT. IN : 35,820  
WT. OUT : 96,900  
=====

NET Wt. : 61,080

Tons 30.540

CON CHOW Load # 1  
ONE COMMODITIES Truck # #118  
State \_\_\_\_\_ Trailer License \_\_\_\_\_ State \_\_\_\_\_  
Hwy

ATTACH THIS COPY TO  
PAPER WORK AND  
LEAVE IN MAILBOX

and the shipper acknowledges delivery to the carrier of the commodity,  
and below which carrier shall carry and deliver to the destination pre-  
ceded. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND  
ALL LOST OR DAMAGED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.  
ABOVE INFORMATION.

FROM: SILVER CREEK SEED, LLC.	TO: Van Straaten
LOCATION: PICABO, IDAHO	LOCATION: JEROME, ID
CONTACT: MARK JOHNSON (208) 280-5213	FOR ACCT. OF: --
SHIPPED BY:	REC'D BY:
DATE: 5/14	DATE:
SCALE TICKET: 6685	SCALE TICKET:
GROSS: 96900	GROSS:
TARE: 35820	TARE:
NET: 61080	NET:

PURCHASE ORDER #

SEED POTATOES

LOT#:

VARIETY:

CON  
CHOW



P.O. Box 646 • 19051 Hwy 20  
Picabo, ID 83348  
(208) 788-3664 • Fax (208) 578-7806  
markj@hughes.net

# BILL OF LADING

1942

## CARRIER INFORMATION

Carrier Name Jane Commodities Load # \_\_\_\_\_  
Carrier Address (Zellweger) Truck # 118  
Contactor License \_\_\_\_\_ State \_\_\_\_\_ Trailer License \_\_\_\_\_ State \_\_\_\_\_  
Driver Signature Mark Johnson

The carrier acknowledges receipt of and the shipper acknowledges delivery to the carrier of the commodity, the kind, grade and quantity described below which carrier shall carry and deliver to the destination prescribed below on or before date specified. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND ALL LOSS OR DAMAGE TO ABOVE DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS. SHIPPER IS RESPONSIBLE FOR PROVIDING ABOVE INFORMATION.

FROM: SILVER CREEK SEED, LLC.	TO: <u>Shaffer</u>
LOCATION: PICABO, IDAHO	LOCATION: <u>Paul, Id</u>
CONTACT: MARK JOHNSON (208) 280-5213	FOR ACCT. OF:
SHIPPED BY:	REC'D BY:
DATE: <u>5/14/13</u>	DATE:
SCALE TICKET: <u>6612</u>	SCALE TICKET:
GROSS: <u>96100</u>	GROSS:
TARE: <u>35840</u>	TARE:
NET: <u>60260</u>	NET:

PURCHASE ORDER #

SEED POTATOES

LOT#:

VARIETY:

Cow  
Choc  
LAURA  
83120018



P.O. Box 646 • 19051 Hwy 20  
Picabo, ID 83348  
(208) 788-3664 • Fax (208) 578-7806  
markj@hughes.net

## BILL OF LADING

1943

### CARRIER INFORMATION

Carrier Name Jones Commodities Load # \_\_\_\_\_  
Carrier Address \_\_\_\_\_ Truck # 118  
Contactor License \_\_\_\_\_ State \_\_\_\_\_ Trailer License \_\_\_\_\_ State \_\_\_\_\_  
Driver Signature Mike [Signature]

The carrier acknowledges receipt of and the shipper acknowledges delivery to the carrier of the commodity, the kind, grade and quantity described below which carrier shall carry and deliver to the destination prescribed below on or before date specified. CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY AND ALL LOSS OR DAMAGE TO ABOVE DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS. SHIPPER IS RESPONSIBLE FOR PROVIDING ABOVE INFORMATION.

FROM: SILVER CREEK SEED, LLC.	TO:
LOCATION: PICABO, IDAHO	LOCATION: <u>Jerome, Id</u>
CONTACT: MARK JOHNSON (208) 280-5213	FOR ACCT. OF: <u>Cow Chow</u>
SHIPPED BY:	REC'D BY:
DATE: <u>5/15/13</u>	DATE:
SCALE TICKET: <u>6698</u>	SCALE TICKET:
GROSS: <u>96,300</u>	GROSS:
TARE: <u>36,020</u>	TARE:
NET: <u>60,280</u>	NET:

PURCHASE ORDER #

SEED POTATOES

LOT#:

VARIETY:

63  
Cow Chow  
LAURA